TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908

No. 121.

HENRY VAN GIESON, APPELLANT,

vs.

C. B. MAILER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

FILED JULY 2, 1908.

(20,780.)

(20,780.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 377.

HENRY VAN GIESON, APPELLANT,

vs.

C. B. MAILE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 13, 1908.

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1 In the Supreme Court of the Territory of Hawaii.

C. B. MAILE, Plaintiff-Appellee,
vs.
JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii, and H. VAN GIESON, Defendants-Appellant-.

Præcipe Designating Parts of Record to be Included in Transcript.

To J. A. Thompson, Esq., Clerk of the Supreme Court of the Territory of Hawaii:

You are hereby requested to make a transcript of the record in the Supreme Court of the Territory of Hawaii in the cause entitled in said Court "C. B. Maile, Plaintiff *versus* James W. Pratt, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii and H. Van Gieson, Defendants," and to include in such transcript of record the following and no other papers and exhibits, to-wit:

1. Plaintiff's Petition and attached thereto and made a part thereof,
(A) District Court Complaint and Summons,
(B) Return of Police Officer of Service of Complaint and Summons,
(C) District Court Execution and Return of Deputy Sheriff, and
(D) District Court Alias Execution,
2. Restraining Order and Order to Show Cause,
3. Return of H. Van Gieson to Order to Show Cause and attached thereto and made a part thereof
Affidavit of H. Van Gieson and
Affidavit of A. M. Brown,
4. Return of James W. Pratt to Order to Show Cause,
5. Temporary Injunction and Order of Allowance,
6. Injunction Bond,
7. Demurrer of H. Van Gieson,
8. Answer of H. Van Gieson,
9. Oral Decision of Circuit Judge J. T. De Bolt,
10. Decree Circuit Judge,
2 11. Notice of Appeal by C. B. Maile,
12. Minutes of Clerk of proceedings before Hon. W. J. Robinson,
13. Minutes of Clerk of proceedings before Hon. J. T. De Bolt,
14. Plaintiff's Exhibit "A," being District Court record and files *in re* James W. Pratt, Tax Assessor *versus* C. B. Maile, Number 213, consisting of the following:
(1) District Court Complaint and Summons and return of police officer,
(2) Defendant's Motion to Quash and set aside service of summons and restrain execution sale, annexed thereto is the

(3) Order of District Magistrate restraining sale,
(4) Return by A. M. Brown, High Sheriff of Alias Execution, annexed thereto is
(5) Sheriff's Notice of sale,
(6) Defendant's Motion to vacate and set aside sale under execution, annexed thereto is
(7) Notice of Motion and Order of service of motion, also
(8) Affidavit of C. W. Ashford,
(9) Affidavit of John F. Colburn and
(10) Affidavit of C. B. Maile
(11) Plea of H. Van Gieson to Motion to vacate and set aside sale,
15. Plaintiff's Exhibit "D," being Receipt dated November 9, 1906 for $652.65 signed by A. M. Brown, Attorney in fact for M. K. Brown to H. Van Gieson,
16. Plaintiff's Exhibit "F," License for sale of salmon, Number 1095 issued to C. B. Maile and dated July 2, 1904.
17. Opinion Supreme Court rendered April 20, 1907.
18. Notice by plaintiff of presentation of decree,
19. Decree Supreme Court,
20. Petition of H. Van Gieson for a Rehearing,
21. Minutes of Clerk of Supreme Court,
22. Petition of H. Van Gieson for appeal to the Supreme Court of the United States,
23. Assignment of Errors,
24. Order allowing appeal,
25. Bond on appeal to the Supreme Court of the United States and
26. Order for the transmission of the Original Transcript of Testimony,

And you are further requested to transmit as part of the record the Original Transcript of Testimony.

Respectfully,

(Sgd.) MAGOON & LIGHTFOOT,
Attorneys for H. Van Gieson, Appellant.

Dated Honolulu, T. H., May 22, 1907.

Endorsed: Supreme Court Territory of Hawaii. C. B. Maile, Plaintiff-Appellee, *vs.* James W. Pratt, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii and H. Van Gieson, Defendants-Appellants. Præcipe Designating Parts of Record to be included in Transcript. Filed May 23, A. D. 1907, at 2 o'clock P. M. J. A. Thompson, Clerk.

3 In the Circuit Court of the First Circuit, Territory of Hawaii.
At Chambers. In Equity.

C. B. MAILE, Plaintiff,

vs.

JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii; H. VAN GIESEN, Trustee; JOHN DOE and RICHARD ROE, Defendants.

Stamps $2.00.

Bill of Complaint.

To the Honorable the presiding Judge at Chambers of said Circuit Court:

1. Humbly complaining showeth unto your Honor, Your Orator, C. B. Maile, a citizen of the United States and of the Territory of Hawaii, and a resident of said Territory, in the City of Honolulu.

2. That your Orator was at all times herein mentioned, and is now the owner of those certain pieces and parcels of land together with improvements thereon situate in Honolulu, more particularly described as follows:

First. All those premises on makai side of Pauahi Street, Honolulu, containing an area of 2241 square feet, being a portion of Royal Patent 226, Land Commission Award 783 and conveyed to C. B. Maile by W. C. Achi as of record in the Registry Office in said Honolulu in Liber 167, page 163.

4 Second. All those premises on Alakea Street, Honolulu, between Merchant and King streets, about 43 x 52 feet, conveyed to Maile by Kahuhu and Kapepehi by deed dated June 1st, 1879, as of record in said office in liber 58 page 341. Said premises being under lease to Chang See for 15 years from November 1st, 1895, at $204 per year.

Third. All those premises at Kawaiiki and Keoneula, Honolulu, described in Royal Patent 2460 conveyed to C. B. Maile by deed of L. Kamakaponiponi and husband, as of record in said office in Liber 177, page 489, and containing 1 2-100 acres.

3. That said first above described parcel was at all times herein mentioned and is now of the value of $4760.00 or thereabouts, and had been for many years last past assessed for taxation at said sum by the Assessor of Taxes above named. That said second above described parcel of land was at all times herein mentioned of the value of $6000.00 or thereabouts, and had during several years last past been assessed for taxation by the above named Assessor of Taxes at and for amounts ranging downward from $10000.00 in the year 1901 to $6000.00 in and for the year 1903. That said third above described parcel of land, situate at Keoneula was at all times herein mentioned of the value of $1000, or thereabouts, and has been for many years last past assessed for taxation by said Assessor of Taxes at said last mentioned figure.

4. That said defendant James W. Pratt was at all times herein

mentioned the duly appointed commissioned qualified and acting Assessor and Collector of taxes in and for the First taxation Division of the Territory of Hawaii, except that, on or about the 29th day of February, 1904, he the said James W. Pratt vacated and re-
5 tired from said office, and that ever since said date the said office has been held and the duties thereof discharged by one James L. Holt, as successor to said James W. Pratt therein.

5. That on or about the 7th day of December, 1903, there was filed and deposited in the district court of Honolulu, Island of Oahu, in the name of said defendant James W. Pratt as Collector of taxes, a certain complaint against your Orator, wherein and whereby said defendant Pratt claimed and asserted that your Orator was indebted to him said Pratt in his official capacity in the sum of $486.60, as and for taxes theretofore assessed upon the books of the Assessor of Taxes in said District of Honolulu, and against the person and property of your Orator, for the years 1900, 1901 and 1902. That thereafter to wit, on the date last aforesaid, there was issued by Lyle A. Dickey, Esq., who was on said date First District Magistrate of the said district of Honolulu, a summons to your orator, to appear before said Magistrate and answer said complaint on the 11th day of December, 1903 at 1.30 o'clock P. M. a copy of said complaint and summons being hereto annexed Marked Exhibit "A" and made a part hereof, but to the original whereof your orator begs leave, upon the hearing herein, for a greater certainty and particularity to refer.

6. That no service of said complaint or of said summons was ever made upon your orator in manner provided by law, but that the only service, or attempted or pretended service thereof, which was at any time made upon your orator was as stated in the return of the officer endorsed on said complaint and summons, a copy of which said return is hereto attached (endorsed on the back of said Exhibit "A") marked Exhibit "B" and made a part hereof, but to the original whereof your Orator begs leave, upon the hearing herein,
6 for a greater certainty and particularity to refer.

7. That your orator did not appear either in person, by attorney or otherwise before said Magistrate or in said district court, or respond to said complaint or summons, or in any wise submit or subject himself to the jurisdiction of said district court in the premises.

8. But that, nevertheless, on or about the 18th day of December, 1903, said Magistrate, presiding at a session of said district court did assume to, and did in fact decide and adjudge your orator in default for want of an answer or appearance in the premises, and did then and there assume to, and did render judgment against your orator, and in favor of said defendant Pratt, as Collector of taxes for the sum in said complaint demanded, to wit, the sum of $486.60, together with 10% penalty, and cost of advertising, and cost of court, the aggregate whereof was then and there the sum of to wit, $540.11.

8*a*. That thereafter, said defendant Pratt did procure said Magistrate to issue, and said Magistrate did issue a certain writ of execution against the property of your orator, and thereafter, to wit, on

the 7th day of January, 1904, said execution was returned *nulla bona* by the High Sheriff of the Territory of Hawaii, a copy of which said writ of execution, together with the return endorsed thereon is hereto annexed, marked Exhibit "C" and made a part hereof, but to the original whereof your orator begs leave upon the hearing herein, for a greater certainty and particularity to refer.

9. That thereafter, to wit, upon the 25th day of May, 1904, said Magistrate, acting at the instance of Frank Andrade, Esq.,
7 he, the said Frank Andrade, Esq., having been the Attorney of record for said defendant Pratt in the matter of said proceedings in the said district court, (and he, the said defendant Pratt having as aforesaid theretofore retired from said office of Assessor and Collector of Taxes as aforesaid, and he not being at said last mentioned date either the assessor or the collector of taxes for said First Taxation Division, or otherwise, or at all interested in said proceedings or said judgment) did issue another and a further paper, denominated by said Magistrate an Alias Execution, upon said judgment, against the property of your orator, a copy whereof, marked Exhibit "D," is hereto attached and made a part hereof, but to the original whereof, your orator begs leave upon the hearing herein, for a greater certainty and particularity to refer.

10. That thereafter, the High Sheriff of the Territory advertised in certain newspapers of Honolulu, that he, said High Sheriff had levied upon the real estate of your orator which is hereinabove described, under and by virtue of said so called alias execution, and that he, said High Sheriff would sell all the right title and interest of your orator in and to said real estate at Public Auction, at said Honolulu, at 12 o'clock on the 28th day of June, 1904; but your orator avers that said High Sheriff did not, either in person or by deputy, or otherwise or at all make any inquiry of your orator, nor any visit to, nor search of or at the home of your orator, for any personal property belonging to your orator, out of which said so called alias execution might have been satisfied; and that your orator was, at all times herein mentioned a resident and householder in said city of Honolulu, occupying a house and residence at Palama, and at all times herein mentioned your orator was the owner of, and
8 had in his possession personal property, to wit, household furniture, and furnishings and cash, out of which said so called alias execution might, had the same been levied thereon, have been satisfied, but that said High Sheriff did not nor did any official subordinate of said High Sheriff, at any time after the issuance of said so called alias execution, make demand upon your orator for the payment or satisfaction of the same, nor for information concerning personality of your orator whereon to levy the same, nor make any levy upon any of the real estate in this bill of complaint described.

11. That thereafter, to wit, on the 30th day of June, 1904, your orator (after due and regular notice to Frank Andrade Esq.) presented in said district court, and before said Magistrate Lyle A. Dickey, a motion that the said so called alias execution be recalled and withdrawn, and that the same, together with all proceedings had or done by virtue thereof, might be set aside. And in support of

said motion your orator contended before said Magistrate that said district court had never obtained jurisdiction of the person of your orator, or other jurisdiction to entitle it to proceed to a judgment in the premises; and that said action had been irregularly brought in the name of said defendant Pratt purporting to act as collector of taxes for said First Division, and did not purport to have been brought for the use of the Territory of Hawaii; and that at the date of the issue of said alias execution said defendant Pratt was neither a collector, nor assesor of taxes in and for said division, and had no interest whatsoever in the subject matter of said suit; and that the mandate of said so called alias execution commanded that the same should be satisfied out of the personal property of defendant if sufficient to be found, yet said High Sheriff without levy upon
9 or search for such personal property had levied upon the realty of your orator; but said magistrate then and there, to wit, on the date last aforesaid overruled and denied your orator's said motion, but without passing upon any of the facts therein alleged or involved.

12. That thereafter, to wit, on the 1st day of July, 1904, (said Lyle A. Dickey having then ceased to be such Magistrate as aforesaid) your orator filed in said district court before Alexander Lindsay Jr., Esq., the then First Magistrate of said district, a further motion that the service of summons made or pretended to have been made upon your orator in said action in said district court on, to wit, the said 7th day of December, 1903, be quashed and set aside for that the same had not been served upon your orator as provided by law, nor had your orator appeared before said court, nor submitted to the jurisdiction thereof in the premises, and also that a temporary restraining order, forbidding the sale of your orator's property under said so called alias execution, be issued to the High Sheriff of said Territory, to restrain said sale until the further order of said district court should be made known in the premises.

13. That thereupon, to wit, on said 1st day of July, 1904, said last named district magistrate in the matter of said suit, did sign and issue an order in the words and figures here following, to wit:

"Upon reading and filing the foregoing Motion it is ordered:

"That the plaintiff herein, and the High Sheriff of the Territory "do refrain from selling, pretending to sell or exposing for sale any "of the property, goods, chattels or effects of said defendant C. B. "Maile under, or by virtue of any writ of execution, or alias execu- "tion, heretofore issued in the above entitled cause, until the further "order of this court in the premises;

"And it is further ordered that said plaintiff do appear before the "undersigned District Magistrate at the Court-room of said Court in "Honolulu at 1.30 o'clock P. M. Wednesday the 6th day of July, "1904, in response to the foregoing Motion, at which time and place, "or as soon thereafter as counsel may be heard, the said motion will "be heard and entertained by the undersigned District Magis- "trate;

10 "It is further ordered that service hereof may be made by "leaving a copy of the foregoing motion and of this order with

"the High Sheriff of the Territory, or with any of his Deputies, or any "other officer or person in charge of the office of said High Sheriff, "and by handing a further copy thereof to Frank Andrade Esq., "Attorney for plaintiff, or leaving the same at his office during the "business hours of any day not less than twenty-four hours prior to "the date herein set for the hearing of said motion.

"Dated this 1st day of July, 1904.

"(Signed) ALEXANDER LINDSAY, JR.,
"District Magistrate of Honolulu, Island of Oahu."

And that thereafter, on said 1st day of July, your orator caused to be made due and regular service of a copy of your orator's said motion in the premises, and of said order of said Magistrate, upon said High Sheriff and upon said Frank Andrade Esq., in manner and form as prescribed in said order hereinabove quoted.

14. That thereafter, to wit, on the 5th day of July, 1904, to which date the sale of your orator's said property under said so called alias execution had been adjourned and continued from the 28th day of June, by said High Sheriff, he the said High Sheriff, at the front door of Kalakaua Hale in said Honolulu, and notwithstanding, and in defiance of the order of said Magistrate hereinabove quoted, did expose for sale, and did sell at Public Auction the pieces and parcels of land and real property belonging to your orator as hereinabove described.

15. That upon said occasion and at said date and place your orator was represented by his attorney C. W. Ashford Esq., and your orator is informed and believes, and upon such information and belief he alleges that his said attorney did, at the time of said sale being announced, and before the same was held and before any of said parcels of land were exposed for sale, enter and publicly proclaim in the presence of said High Sheriff and of the Auctioneer then and there engaged by said High Sheriff to conduct said sale, and
11 of all and singular the persons then and there assembled a protest against the holding of said sale, and against the selling of said property or any thereof, for the reasons, among others, as then and there publicly stated by said attorney, that the judgment upon which said so called alias execution was based was an invalid and void judgment, because the district court of Honolulu was without jurisdiction to render the same, at the date when the same was rendered, and that the said so called alias execution under which said high sheriff was proceeding to sell said property was irregular, illegal and invalid, and that the sale of said property had theretofore, to wit, on said 1st day of July, 1904, been restrained and enjoined by the order of said last named district magistrate, as hereinabove quoted, and that no purchaser at said proposed sale would or could obtain a valid title to any of the property so proposed to be sold, and that your orator would resist any claim of title which might be made by any purchaser thereat; and your orator alleges in particular that, during all of the time in this paragraph referred to, said defendant H. Van Giesen was then and there present, and heard all and singular the protest and statements then and there made by your ora-

tor's said attorney, and further, that said defendant H. Van Giesen then and there well knew all and singular the facts hereinbefore in this Bill of Complaint set forth.

15*a*. That at all times herein mentioned, said defendant Van Giesen was an official subordinate of said Arthur M. Brown in the office of said Brown as High Sheriff of said Territory, to wit, a clerk in the office of said high sheriff; and that, as plaintiff is advised and believes, and upon such advice and belief alleges, it was then
12 and there incompetent and illegal for said Van Gieson to become a purchaser at the sale so held as aforesaid, or at any sale held by said high sheriff under the alias writ of execution hereinabove mentioned, or under any writ of execution addressed to said high sheriff.

16. That at the time and place of the holding of said sale, and when the first of said parcels was exposed for sale, (as your orator is informed and believes and upon such information and belief alleges, he not having been personally present on said occasion,) there were not above ten persons present and within hearing, either of your orator's said attorney or of said auctioneer, and that of the persons then and there so present, fully one-half were members and attaches of the police force of Honolulu. That said parcels of land were then and there successively exposed and offered for sale, and that each thereof was bid off by, and knocked down to said defendant Van Giesen, who was then and there a police officer upon said police force, and who then and there purported to act in the premises as trustee for some person or persons unnamed by him, and who is and are unknown to your orator; and that there were not at any time during the holding of said sale above twenty-five persons present or within the hearing of said auctioneer, and that fully one-half of the persons so present at any and all times during the holding thereof were members and attaches of said police force of Honolulu. That said defendant Van Giesen was and *in* the same person by whom was made and signed the return endorsed on the back of the complaint and summons in said district court, (Exhibits "A" and "B" hereof), and which said return is there signed by said defendant Van Giesen in the name of "H. Van Giesen, Police Officer."

17. That the prices realized upon said sale for said parcels respectively were as follows, for said first above described parcel
13 the sum of Twenty-five dollars ($25.00), whereas the true and reasonable value of said parcel upon said date was not less than forty-seven hundred and sixty dollars ($4,760.00); for said second above described parcel the sum of Three hundred and ten dollars ($310.00) whereas the true and reasonable value of said parcel upon said date was not less then six thousand dollars, ($6,000.00). The third above described parcel for the sum of two hundred dollars, ($200.00) whereas the true and reasonable value thereof was then and there not less than one thousand dollars ($1,000.00), and that the prices and amounts so bid and realized for said parcels respectively then and there were and now are grossly inadequate, all of which said facts were then and there well known to said defendant Van Giesen, and your orator is informed and believes, and upon such information and belief he alleges, that prospective

bidders for said parcels, or certain thereof, attended at said sale with intention to purchase the same, or certain thereof at prices greatly in advance of the prices for which the same were respectively bid off, but that such prospective bidders were alarmed and deterred and prevented from bidding upon said sale by reason of the statements then and there made by your orator's attorney, as hereinabove set forth, and especially the statements that your orator had never been subjected to the jurisdiction of said district court, in the matter of said action, and that said district magistrate Alexander Lindsay Jr. had theretofore issued, and there was then and there pending and unreversed, a Restraining Order forbidding the sale of said property as hereinabove alleged.

J. B. 18. That said sale was unfairly and illegally conducted in this particular, viz: That said high sheriff, who was then and there present, when bidding upon the second above described parcel was in progress, and at a point where there was com-
14 petitive bidding between at least three different bidders, announced and proclaimed that he, said high sheriff would insist upon the immediate deposit with him, upon the fall of the hammer, in respect of each parcel then unsold, of at least 50% of the purchase price for which the same should be bid off, whereas in the notice and terms of sale published by said high sheriff, no such condition, nor any similar condition was contained or announced. That your orator's attorney then and there protested against the imposition of such condition as being unfair to your orator, calculated to deter bidders, and in unauthorized amendment of the terms of sale as announced and as provided by law.

19. But that said high sheriff persisted in said requirement, and your orator believes, and upon such belief alleges, that said high sheriff so announced and persisted in said condition for the purpose of deterring all bids and bidders except such bids as should be made by said defendant Van Giesen, and with a view and purpose to unreasonably depress the price of said parcels then unsold. And your orator believes, and upon such belief alleges that said high sheriff utterly failed and neglected to exact or enforce said condition with respect to any or either said sums bid by said defendant Van Giesen for said parcels respectively, and for which said parcels were respectively struck off to said defendant Van Giesen, but your orator has no means in advance of the hearing herein, of verifying his said belief in this particular.

20. That thereafter, to wit the day succeeding, viz: July 6, 1904, your orator presented to said last named district court and magistrate a motion to set aside the sale so held as aforesaid, by said high sheriff, of the property herein described. That said motion was accompanied by affidavits setting forth the circumstances under
15 which said sale was held, the value of said parcels respectively, and the prices for which they were respectively bid off, together with other pertinent facts. That upon said motion, said magistrate made an order that the same, together with said affidavits and order be served, by copies, upon said Frank Andrade Esq. and said defendant Van Giesen, and that said motion be heard before

said magistrate at the time indicated in the notice thereof, to wit, at 1.30 o'clock P. M. on Monday the 11th day of July, 1904, or as soon thereafter as counsel may be heard.

21. That thereafter, said defendant Van Giesen filed a plea to said motions and each of them then pending before said last named district magistrate, and, the hearing of both of said motions having been by order of said district court, and by consent of the parties, continued to the 20th day of July, 1904, said motions, and both of them, to wit the motion mentioned in paragraph numbered 12 hereof, and said motion to set aside said sale, were duly and regularly submitted on the part of your orator, and on the part of said defendants Pratt and Van Giesen, for decision by said court and magistrate; and that thereafter, to wit, on the 15th day of August, 1904, said court and magistrate rendered a decision upon said motions and each of them, wherein and whereby the same, and each of the same were and are overruled and denied. That no evidence was offered or heard upon the hearing of said motions, other than the affidavits attached thereto respectively, and that said decision and decisions did not proceed and were not founded upon any lack of evidence to sustain the facts set forth in said affidavits, nor were said facts in anywise denied, but said decision was based solely, (as your orator is informed and believes, and upon such informa-
16 tion and belief alleges,) upon the ground that said district court and magistrate had no jurisdiction or authority to make any order in the premises except to dismiss said motions and each of them.

22. And your orator avers and submits that he has exhausted his remedy at law, in the case referred to, in his efforts to secure the setting aside and annulment of said service of summons, and of said judgment against your orator, and of said so called alias execution, and of the levy and sale made thereunder by the high sheriff, and that your orator is now without remedy for the wrongs and injustice done him in the premises, except by and through the medium of a court of equity where matters of this character are properly cognizable and relievable. And that more than six months have elapsed since the rendition by said district court of said judgment against your orator, and that it is no longer competent or possible for your orator to sue out or prosecute a writ of error to said court in respect of said judgment.

23. That the names of the above named defendants John Doe and Richard Roe, are fictitious names, and are used by your orator herein to designate persons whose true names are unknown to your orator, and whose true names when discovered, your orator begs leave to insert in the record herein, and thereafter to proceed against such defendants herein by and under their true names. And your orator believes, and upon such belief alleges that one or the other of said defendants herein, designated as John Doe and Richard Roe, but which of said defendants your orator is uninformed, is the person in whose interest and whose benefit, and as trustee for whom said defendant Van Giesen bid off the said parcels of land and that both

said defendants John Doe and Richard Roe claim some in-
17 terest in said described property, in hostility to the right and claim of your orator therein.

24. That on or about the 5th day of July, 1904, said high
J. B. sheriff purporting to act in the premises under and by virtue of said alias execution, and in pursuance of said sale, executed and delivered to said defendant Van Giesen Trustee, a deed of all and singular the property hereinbefore described; and thereafter, to wit, on or about the — day of ——, 1904, said defend-
ant Van Giesen caused said deed to be recorded in J. B.
J. B. the Hawaiian Registry of Deeds, and the same was so recorded in Liber 261 at page 226 thereof, and that the said deed and the record thereof, now constitute and operate as a cloud upon the title of your orator in and to the premises therein, and in this bill of complaint described.

25. That your orator is informed and believes, and upon such information and belief he alleges, that said defendant Van Giesen stood as a bidder at said sale, and procured said parcels to be struck off and knocked down to him at said sale, not on his personal account nor for his personal benefit, but at the instance, and for the use and benefit of some other person or persons, unknown to your orator; and that said defendant Van Giesen now holds the record title of said property and premises in trust for and subject to the instructions of some undisclosed principal and *cestui qui trust,* whose name and identity are unknown to your orator; and that your orator is apprehensive that said defendant Van Giesen, unless restrained and forbidden by the order of this Honorable Court, will execute and deliver to some third person or persons, one or more instruments of conveyance of said property and premises, or of a portion or portions thereof, or one or more instruments of mortgage or other
18 hypothecation or incumbrance thereof or thereon, and will cause and procure such instrument or instruments to be recorded in said registry of conveyances and thereby further complicate and prejudice the rights and claim of your orator in and to said property.

26. And your orator avers and submits that said judgment so rendered in and by said district court against your orator was and is void, and of no effect, for the reason that said district court did not, prior to the rendition of said judgment, obtain jurisdiction of the person of your orator in the premises, or other jurisdiction enabling said court to proceed to, and to pronounce and render judgment against your orator in the premises; and that said judgment is irregular and void in that in and by said complaint and summons, the plaintiff in said action does not sue, nor purport to sue for the use of the Territory of Hawaii; and that said so called alias writ of execution was and is irregular, null and void for the reason that said district court and magistrate had no authority or jurisdiction in said cause to issue said writ, or any other writ of execution succeeding the return of said original writ of execution hereinbefore mentioned; and that the mandate of said so called alias execution, (provided said writ was not irregular or illegal) was not executed

by said high sheriff, and that the action of said high sheriff in levying upon, and in exposing for sale the real property of your orator, without having levied upon, or searched or enquired for personal estate of your orator out of which to satisfy said execution, was and is irregular, unauthorized and void; and that said sale so held by said high sheriff was and is irregular, illegal and void, because of any and all the facts hereinbefore in this bill of complaint set forth,

and because of any and all other facts, not herein specifically
19 alleged, but which appear from and upon the records and files in the matter of said action so brought and prosecuted against your orator in said district court as aforesaid; and that the deed so executed and delivered as aforesaid to said defendant Van Giesen was and is irregular, illegal and void, and should be so declared by a decree of this Honorable Court.

27. In tender consideration whereof, and for-as-much as your orator can have no relief at and by the strict rules of the common law, but can have relief only in a court of equity, where matters of this nature are properly cognizable and relievable.

27½. And to the end therefore that said defendants James W. Pratt (in whatsoever capacity he may now be or appear) and H. Van Giesen, (in whatsoever capacity he shall now be or appear) and also said defendants John Doe and Richard Roe, (when their or either of their true names shall be ascertained and inserted in the record herein, and they or either of them shall be brought before this Honorable Court by due process of law,) may full, true, direct and perfect answer make, (but not upon oath, answer upon oath being hereby expressly waived,) to all and singular the facts and averments hereinbefore alleged and set forth, and that as fully and particularly as though the same were here again one by one repeated, and they, the said defendants, thereunto, and unto each thereof, particularly interrogated; and that, in particular, the said defendant Van Giesen may full true and direct perfect and complete answer and discovery make as to the name, residence, and identity of the person or persons, if any there be, for whom, the said defendant Van Giesen acted, or purported or pretended to act, in and about the matters in this bill of complaint alleged.

28. And that your orator may have a decree herein de-
20 claring judgment hereinabove mentioned, which was rendered against your orator in and by said district court and magistrate on said 18th day of December, 1903, to be null and void, and declaring each and every successive steps thereafter taken by, or in the name of said defendant Pratt, whether acting as collector of taxes, or as assessor of taxes, for said first division, or otherwise, in pursuance of, or in reliance, or purported reliance; upon said judgment, to have been and to be null and void and of no binding effect upon your orator, or your orator's property above mentioned; and, in particular, declaring said described sale of your orator's said property to have been illegal null and void and to have conveyed and conferred no right, title or interest in or to said property or any thereof to or upon said defendant Van Giesen or any other person; and setting aside and annulling said sale; and setting aside, can-

celling and declaring null and void said deed of conveyance so executed and delivered as aforesaid by said high sheriff to said defendant Van Giesen; and ordering and commanding that said last mentioned deed be delivered up for cancellation, and providing for the entry of record in said registry of conveyances of a suitable and appropriate form of words to show and declare that such said deed has been and is avoided, cancelled and of no effect; and that said defendant Van Giesen, whether in his own individual capacity, or as the agent or trustee of any other person or persons be perpetually enjoined from setting up said described deed, or from presenting introducing or using the same, in any court of justice, and from asserting any right or claim thereunder of any description whatsoever; and that pending a final decree to be rendered herein a temporary injunction, or restraining order, or both may issue out of this Honorable Court directed to said defendant Van Giesen,
21 his attorneys, principals and agents, and forbidding him and them, until the further order of this Honorable Court in the premises, to execute acknowledge deliver or present for record, or procure to be executed acknowledged delivered or recorded any instrument of conveyance or pretended conveyance, or of hypothecation or incumbrance of, upon or concerning the whole or any part or portion of the property hereinbefore described and referred to; and awarding costs of this proceeding to your orator; and that your orator may have such further relief or such other relief in the premises as the circumstances of the case shall warrant, and to equity shall seem appropriate; and said plaintiff hereby offers and agrees to repay to said Van Giesen such sums of money as the court shall find should be repaid in the premises, together with legal interest thereon.

29. May it please this honorable court to grant unto your orator not only the writ of subpœna commanding said defendants and each of them to be and appear before this Honorable Court upon a day to be therein named, and thereafter to stand to and abide any and all further the orders and decrees of this Honorable Court in the premises, but also the writ of injunction issuing out of and under the seal of this Honorable Court, directed to said defendant Van Giesen, his principals agents and attorneys, commanding them, and each of them, until the further order of this court in the premises, to absolutely desist and refrain from executing acknowledging delivering or presenting for record, or procuring the execution acknowledgment delivery or recordation of any instrument or instruments of conveyance, or pretended conveyance or of mortgage or incumbrance of any character whatsoever, of, upon or concerning the said propery hereinabove described, or any part, piece or parcel thereof, and that upon a final hearing herein, such injunction may be
22 continued amplified and made perpetual as the circumstances of the case shall suggest, and the principals of equity permit; and that pending any order or decision which this Honorable Court shall deem it appropriate to make, with reference to the issue of such Temporary Injunction, a Restraining Order may issue to said defendant Van Giesen his principals, attorneys and agents restraining

and forbidding them, as is hereinabove prayed with reference to such Temporary Injunction.

And your orator will ever pray.

Dated this 19th day of August, 1904.

(Sgd.) C. B. MAILE, *Plaintiff.*

(Sgd.) C. W. ASHFORD,
Attorney for Plaintiff.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

C. B. Maile having been duly sworn, deposes and says:

That he is the plaintiff named in the foregoing bill of complaint. That he has had read and explained to him the said bill of complaint and knows the contents thereof, and that the allegations therein contained are true, except those matters which are therein alleged upon information, advice or belief, and as to those matters he believes them to be true.

(Sgd.) C. B. MAILE.

Sworn to before me this 20th day of August, 1904.

[SEAL.] N. FERNANDEZ,
Notary Public, First Judicial Circuit, Territory of Hawaii.

23 Form 1½—6,000-5-04.

2167 1900
2424 1901
..... 1902
Book—No. pg. 72..... 1902

EXHIBIT "A."

Summons.

In the District Court of Honolulu, Territory of Hawaii.

JAMES W. PRATT, Collector of Taxes — Division, Plaintiff,
vs.
C. B. MAILE, Defendant.

Assumpsit.

Territory of Hawaii to the High Sheriff of the Territory of Hawaii, his Deputy, or any Policeman in the District of Honolulu, Island of Oahu, greeting:

You are hereby commanded to summon C. B. Maile if he can be found in the District, to appear before me, at my office 64 Merchant St. in Honolulu, upon the 11th day of December 1903, 1.30 o'clock P. M., there to answer unto James W. Pratt Assessor of Taxes in and

for the First Taxation Division of the Territory of Hawaii, in a plea wherein the plaintiff declares and says:

That said defendant C. B. Maile is lawfully indebted to the plaintiff, in his official capacity aforesaid, in the sum of four hundred eighty six & 60/100—486-60/100 Dollars for Taxes assesed against the person and property of said defendant, on the books of the Assessor of Taxes for the District of Honolulu, Island of Oahu, for the year- 1900-1-2. And defendant, though thereunto requested, has thus far failed and neglected, and still doth neglect and refuse to pay the same, or any part or portion thereof; wherefore, plain-
24 tiff asks for judgment against said defendant for said sum of four hundred eighty six & 60/100—486-60/100 Dollars, to-
and
J. B. gether with ten per cent. [in addition thereto]*, ∧ [adver-
of advertising in addition thereto
tising]* costs, ∧ and [per cent. interest per annum until paid]* as by law provided, and for costs of Court.

Notify the said C. B. Maile that upon default to attend at the place, day and hour above mentioned, judgment will be rendered against him *ex parte*, by default.

Given under my hand this 7th day of December 1903.

(Signed) LYLE A. DICKEY,
District Magistrate of Honolulu,
Territory of Hawaii.

Endorsed: Book — No. — District Court of Honolulu Island of — James W. Pratt, Collector of Taxes — Division *v.* C. B. Maile Summons. Issued at — o'clock — m. — 190-. Returned at — o'clock — m. — 1903. Costs. Summons — $ — Service — Mileage — Frank Andrade Stangenwald Bldg. Attorney for Plaintiff.

25 EXHIBIT "B."

Personally delivered a true copy of the within Summons to the within named C. B. Maile as directed, this 7th day of December, 1903.

(Signed) H. VAN GIESON,
Police Officer.

[*Words enclosed in brackets erased in copy.]

26 EXHIBIT "C."

District Court of Honolulu, Island of Oahu, Territory of Hawaii.

JAMES W. PRATT, Assessor and Collector, 1st Division,
v.
C. B. MAILE.

Execution.

The Territory of Hawaii to the High Sheriff of the Territory of Hawaii, his Deputy; the Sheriff of the Island of Oahu, his Deputy, or any Constable in the District of Honolulu, Island of Oahu, Territory of Hawaii:

You are hereby commanded to levy upon the personal property of C. B. Maile if any within your district, and, giving thirty days' previous notice, as required by law, to sell the same, or so much thereof as may be found necessary, at public sale, to the highest bidder, in order to satisfy a judgment entered against him in the District Court of Honolulu, Island of Oahu, Territory of Hawaii, on the 18th day of December, A. D. 1903, in favor of James W. Pratt, Assessor and Collector of 1st Division as follows:

Judgment for Plaintiff	$486.60
10% Penalty	48.66
Advertising Costs	1.50
Costs of Court	3.35
Total Judgment	$540.11
And Execution Costs	1.00

collecting also the legal interest thereon, from the date thereof, and your costs, and the expenses of levy, advertisement and sale. Make due return of this writ, with your doings thereon, and the
27 money by you collected, within sixty days from the date hereof.

Given under my hand this 19th day of December 1903.

(Signed) LYLE A. DICKEY,
District Magistrate of Honolulu, Island of Oahu.

Executed the within Writ by making a due and diligent search within the Judicial District of Honolulu, Island of Oahu, Territory of Hawaii, for personal property belonging to the within named C. B. Maile and subject to execution, but no such property can be found within said Judicial District, I therefore return the within execution unsatisfied, this 7th day of January, A. D. 1904.

Honolulu, Oahu.

(Signed) ALBERT L. McGURN,
Deputy Sheriff, Ter. of Hawaii.

Endorsed: District Court of Honolulu Island of Oahu Territory of Hawaii. James W. Pratt, Assessor and Collector 1st Division. *v.* C. B. Maile. Execution. Date December 19th 1903. Issued at — o'clock — m. — 190-. Returned at — o'clock — m. — 190- ——

28 EXHIBIT "D."

District Court of Honolulu, Island of Oahu, Territory of Hawaii.

JAMES W. PRATT, Collector of Taxes First Division,

v.

C. B. MAILE.

Alias Execution.

The Territory of Hawaii to the High Sheriff of the Territory of Hawaii, His Deputy; the Sheriff of the Island of Oahu, His Deputy, or any Constable in the District of Honolulu Island of Oahu Territory of Hawaii:

You are commanded to levy upon the personal property of C. B. Maile if any within your district, if sufficient cannot be found, then upon his real property within said district, and, giving thirty days' previous notice, as required by law, to sell the same, or so much thereof as may be found necessary, at public sale, to the highest bidder, in order to satisfy a judgment entered against him in the District Court of Honolulu, Island of Oahu Territory of Hawaii, on the 18th day of December, A. D. 1903, in favor of James W. Pratt, Collector of Taxes, First Division for $486.60, 10% penalty, $48.66, Advertising Costs $1.50 and costs $3.35, Total Judgment $540.11 and Cost of Executions $2.00, collecting also the legal interest thereon, from the date thereof, and your costs, and the expenses of levy, advertisement and sale.

Make due return of this writ, with your doings thereon, and the money by you collected, within sixty days from the date hereof.

Given under my hand this 25th day of May, 1904.

(Signed) LYLE A. DICKEY,
District Magistrate of Honolulu, Island of Oahu.

29 Endorsed: District Court of Honolulu Island of Oahu Territory of Hawaii. James W. Pratt, Collector of Taxes First Division *v.* C. B. Maile. Execution. Dated ——, 190–. Issued at — o'clock — M. ——, 190–. Returned at — o'clock M. ——, 190–. ——.

30 Title of Court and Cause.

Restraining Order.

Upon reading and filing said plaintiff's bill of complaint in this cause, and upon motion of C. W. Ashford, Esq., Attorney for plaintiff herein, and good cause appearing therefor,

It is ordered that the above named defendant H. Van Gieson, together with all and singular his principals, agents and attorneys, are hereby commanded under such penalty as may seem appropriate in case of a violation of this order, to absolutely desist and refrain

from executing, acknowledging, delivering or presenting for record, and from procuring the execution, acknowledgment, delivery or recordation of any instrument or instruments of conveyance, or of mortgage or other incumbrance whatsoever, of upon or concerning those certain lands and premises hereinafter and in said bill of complaint described, to wit:

First. All those premises on makai side of Pauahi Street, Honolulu containing an area of 2241 square feet, being a portion of Royal Patent 226 Land Commission Award 783 and conveyed to C. B. Maile by W. C. Achi as of record in the Registry Office in said Honolulu in Liber 167, page 163;

Second. All those premises on Alakea street, Honolulu, between Merchant and King Streets, about 43 x 52 feet, conveyed to Maile by Kahuhu and Kapepehi by deed dated June 1st, 1879, as of record in said office in Liber 58, page 341. Said premises being under lease to Chang See for 15 years from November 1st, 1895, at $204 per year.

Third. All those premises at Kawaiiki and Keoneula, Honolulu, described in Royal Patent 2460, conveyed to C. B. Maile by deed of L. Kamakaponiponi and husband, as of record in said office
31 in Liber 177, page 489 and containing 1.2-100 acres, until the further order of said circuit court shall be made known in this behalf.

And it is further ordered that said defendant H. Van Gieson do show cause, if any he have, before the undersigned Third Judge of said circuit court, at his chambers in Aliiolani Hale Honolulu, at 10 o'clock in the forenoon of Tuesday the 23rd day of August, 1904, why there should not issue herein a Temporary Injunction such as is prayed by said plaintiff in his said bill of complaint.

It is further ordered that service hereof (together with a copy of said bill of complaint, and of the summons herein) be made upon said defendant H. Van Gieson not later than 12 o'clock noon, of Monday the 22nd day of August, 1904, provided he, the said defendant H. Van Gieson can be found within this circuit.

Dated this 20th day of August, 1904.

(Sgd.) W. J. ROBINSON,
Third Judge of said Circuit Court.

32 Title of Court and Cause.

Return of H. Van Gieson to Order to Show Cause why a Temporary Injunction Should not Issue.

Now comes H. Van Gieson one of the defendants herein, and showing cause why a temporary injunction should not issue herein, says that same should not issue, and bases his showing on his demurrer herein, and on the affidavits of H. Van Gieson and A. M. Brown hereto attached and made a part hereof.

Wherefore, he submits that a temporary injunction herein should not issue.

Dated August 29, 1904.

H. VAN GIESON,
(Sgd.) By His Attorneys, ROBERTSON & WILDER.

33 Title of Court and Cause.

Affidavit of H. Van Gieson.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

H. Van Gieson being duly sworn, deposes and says that he is the H. Van Gieson referred to in the bill of complaint of C. B. Maile herein, that he is and was at all times herein mentioned a police officer; that he is the officer who made the service re-
J. B. ferred to in paragraph 6 of the bill of complaint; that as a matter of fact, he did show the original of said summons and complaint to the said C. B. Maile at the time of delivering a copy thereof to said C. B. Maile, although affiant in his return of service inadvertently omitted to state that he had shown the original thereof to said C. B. Maile; that at said execution sale, in bidding for said parcels of land and in having same knocked down to him, affiant was acting solely for himself and for no one else; that after said sale, he so notified the High Sheriff and the deed from the High Sheriff was made at affiant's request to affiant in his individual capacity; that affiant fully complied in all particulars with all the terms and conditions of said sale, that at said execution sale Mr. C. W. Ashford, who was then and is now the attorney for said C. B. Maile was a bidder for the second parcel of land.

And further affiant saith not:

(Sgd.) H. VAN GIESON.

Subscribed and sworn to before me this 26th day of August, A. D. 1904.

(Sgd.) CHAS. F. CHILLINGWORTH,
[N. S.] *Notary Public, First Judicial Circuit.*

34 Title of Court and Cause.

Affidavit of A. M. Brown.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

A. M. Brown, being duly sworn, deposes and says that he is and was at all times herein mentioned the High Sheriff of the Territory of Hawaii; that after the issuance of the execution referred to in paragraph 8A of the bill of complaint herein, he caused demand to be made on said C. B. Maile for the payment of same and that said C. B. Maile never did pay same, that although search was made, a sufficient amount of personal property to satisfy said execution could not be found, and that consequently, said execution was returned unsatisfied; that thereafter another execution was issued against the personal and real property of said C. B. Maile to satisfy said judgment and although demand was made on said C. B. Maile, said execution was not satisfied, said second execution not being re-

ferred to at all in said bill of complaint; that pursuant to said second execution certain real property belonging to said C. B. Maile was attached and advertised for sale to satisfy same; that upon the advertised day of sale, affiant continued the sale for one week and notice of such continuance was sent to said C. B. Maile; that said sale was discontinued and said second execution was withdrawn upon the promise of John F. Colburn, acting as the agent of said C. B. Maile, made to F. Andrade attorney for the Tax Assessor, that he, Colburn, acting for said C. B. Maile would settle the said judgment that said John F. Colburn failed to keep his said promise, and a was issued, said third execution
third execution ∧ being referred to in paragraph 9 of said J. B.
bill of complaint; that before levy was made pursuant to
said third execution, said C. B. Maile came to affiant's office
35 and stated to affiant that he was surprised that said John F. Colburn had not paid the amount of said judgment, as the money to pay same was in said Colburn's hands and he, Maile, was desirous that the same be paid; that thereafter pursuant to said third execution, certain real property of said C. B. Maile was again levied upon and advertised for sale on June 27, 1904, at noon; that on June 27, 1904, said John F. Colburn, acting for said C. B. Maile, requested a continuance of said sale for one week and that said request was granted and *sale* sale was continued until July 5, 1904, and that John F. Colburn was present when the announcement of such continuance was made at the front door of the station house at noon on said June 27, 1904, that all execution sales made by him in his official capacity were made and are made for cash; that the execution refferred to in said bill of complaint was made for cash; that affiant's requirement of a deposit of at least 50% of the amount bid was not in conflict with and was authorized by said notice of sale; that affiant denies that he insisted on said deposit for the purpose of deterring all bids and bidders except such bids as should be made by said H. Van Gieson; and denies that he insisted on said deposit
or depress at all
J. B. with a view and purpose to unreasonably depress, ∧ the price of said parcels of land then unsold; that affiant's sole purpose in requiring said deposit was to protect himself from any irresponsible bidder; that affiant denies that he failed to exact and enforce said condition with respect to a deposit of 50% against said H. Van Gieson as to the sums bid by him. And further affiant saith not.

(Sgd.) ARTHUR M. BROWN.

Subscribed and sworn to before me this 26th day of August, A. D. 1904.

(Sgd.) CHAS. F. CHILLINGWORTH,
[N. S.] *Notary Public, First Judicial Circuit.*

36 Title of Court and Cause.

Return of James W. Pratt to Order to Show Cause why a Temporary Injunction Should not Issue.

Now comes James W. Pratt, one of the defendants herein, and showing cause why a Temporary Injunction should not issue herein, says that same should not issue, and bases his showing on the affidavits of H. Van Gieson and A. M. Brown, and upon the demurrer of said H. Van Gieson on file herein.

Wherefore he submits that a Temporary Injunction herein should not issue.

Dated Honolulu August 29, 1904.

JAMES W. PRATT,
(Sgd.) By His Attorney, FRANK ANDRADE.

37 Title of Court and Cause.

Temporary Injunction.

The Territory of Hawaii to H. Van Gieson, His Principals, agents and Attorneys, Greeting:

Whereas, in a bill of complaint in equity exhibited in said circuit court on or about the 20th day of August, 1904, wherein the above named C. B. Maile is party-plaintiff, and you, the said H. Van Gieson are one of the parties defendant, a copy of which said bill of complaint has heretofore been served upon you, the said H. Van Gieson, it is prayed, *inter alia*, that you, the said defendant H. Van Gieson, be restrained *pendente lite* from executing, acknowledging, delivering, or presenting for record, or procuring the execution, acknowledgment, delivery or recordation of any instrument or instruments of conveyance or pretended conveyance or of mortgage or incumbrance of any character whatsoever, of, upon or concerning any part, piece or parcel of those certain lands and premises in said bill of complaint and hereinafter in this Writ more particularly described and referred to; and

Whereas upon a hearing duly and regularly had in this behalf, before the Honorable W. J. Robinson, Third Judge of said circuit court, sitting at Chambers, on the 1st day of September, 1904, at which said hearing you, the said defendant H. Van Gieson were personally present, and were duly and regularly represented by counsel, it was ordered that Temporary Injunction *pendente lite* do issue to and against you, the said last named defendant as prayed in said bill of complaint;

Now therefore you, the said H. Van Gieson defendant herein, your principals, agents and attorneys are all and severally hereby
38 strictly commanded to forthwith desist and until the further order of said circuit court, or said judge thereof sitting in Chambers shall be made known in the premises, to absolutely refrain from executing, acknowledging, delivering or presenting for record,

or procuring the execution, acknowledgment, delivery or recordation of any instrument or instruments of conveyance or pretended conveyance or of mortgage or incumbrance of any character whatsoever of, upon or concerning those certain lands and premises situate in the district of Honolulu, and Island of Oahu, and more particularly described as follows, that is to say;

First. All those premises on makai side of Pauahi Street, Honolulu, containing an area of 2241 square feet, being a portion of Royal Patent 226, Land Commission Award 783, and conveyed to C. B. Maile by W. C. Achi as of record in the Registry Office in said Honolulu in Liber 167, page 163.

Second. All those premises on Alakea Street, Honolulu, between Merchant and King Streets about 43 x 52 feet conveyed to Maile by Kahuhu and Kapepehi by deed of June 1st, 1879, as of record in said office in Liber 58, page 341. Said premises being under lease to Chang See for 15 years from November 1st, 1895, at $204 per year.

Third. All those premises at Kawaiiki and Keoneula, Honolulu, described in Royal Patent 2460 conveyed to C. B. Maile, by deed of L. Kamakaponiponi and husband, as of record in said office in Liber 177, page 489 and containing 1 2/100 acres.

Hereof fail not at your peril.

Witness the Honorable W. J. Robinson, Third Judge of the Circuit Court of the First Circuit of said Territory of Hawaii, at Honolulu this 2nd day of September, 1904.

J. B. [SEAL.] (Sgd.) [M. T. SIMONTON,]*
GEORGE LUCAS,
Clerk of said Circuit Court.

39 *Order of Allowance.*

The foregoing Writ is allowed this 2nd day of September, 1904.
(Sgd.) W. J. ROBINSON,
Third Judge of said Circuit Court.

40 Title of Court and Cause.

Injunction Bond.

Know All Men By These Presents That We C. B. Maile as Principal, and John F. Colburn as Surety, both of Honolulu, in the Island of Oahu, are held and firmly bound unto H. Van Gieson one of the above named defendants, in the sum of Five Hundred Dollars ($500.00) to the payment whereof well and truly to be made, we hereby bind ourselves, our heirs, executors and administrators.

The condition of this obligation is as follows:

Whereas in a suit in equity entitled as above, said bounden principal has prayed for the issue of a Temporary Injunction, against said defendant H. Van Gieson to restrain said Van Gieson, his prin-

[* Words enclosed in brackets erased in copy.]

cipals agents and attorneys from conveying or attempting to convey or procuring the conveyance of those certain lands and premises mentioned in the bill of complaint in this cause, or any thereof; and,

Whereas upon a hearing duly and regularly had in said cause, it has been ordered that a Temporary Injunction, as prayed in said bill of complaint do issue herein to and against said defendant Van Gieson his principals agents and attorneys;

Now Therefore if said Temporary Injunction shall issue as ordered in said cause; and if said bounden principal shall well and truly reimburse and pay to said defendant Van Gieson all and singular the damages which he, the said defendant Van Gieson shall sustain by reason of the issue of such Temporary Injunction in the event that the same shall be finally dissolved and disallowed, then this obligation shall be void, otherwise of full force and effect.

In Witness whereof, we have hereunto set our hands and
41 seals at Honolulu aforesaid, this 1st day of September, 1904.

(Sgd.) C. B. MAILE.
(Sgd.) JOHN F. COLBURN.

Executed in presence of
(Sgd.) C. W. ASHFORD.

The foregoing Bond is approved this 2nd day of September, 1904.
(Sgd.) W. J. ROBINSON,
Third Judge of said Circuit Court.

42 Title of Court and Cause.

Demurrer of H. Van Gieson to the Bill of Complaint of C. B. Maile.

This defendant by protestation, not confessing any or all of the matters and things in the plaintiff's said bill of complaint contained to be true, in such manner and form as the same are therein set forth and alleged, does demur to said bill, and for cause of demurrer shows as follows:

1. That said bill of complaint is ambiguous unintelligible and uncertain in that it fails to set out in full and with particularity;

(*a*) The advertised notice of sale referred to in paragraph 10 of said bill of complaint;

(*b*) The motion filed and presented before District Magistrate Lyle A. Dickey on June 30, 1904, referred to in paragraph 11 of said bill of complaint;

(*c*) The motion filed and presented before District Magistrate Alexander Lindsay, Jr., on July 1, 1904, referred to in paragraph 12 of said bill of complaint;

(*d*) The motion filed and presented before said District Magistrate Alexander Lindsay, Jr., on July 6, referred to in paragraph 20 of said bill of complaint;

(*e*) The plea filed by said defendant to said motions, referred to in paragraph 21 of said bill of complaint.

2. That the said plaintiff has not, in and by his said bill, made or stated such a case as does or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant.

Wherefore, and for divers other good causes of demurrer, appearing in the said bill, this defendant does demur thereto, and
43 humbly prays the judgment of this court whether he shall be compelled to make any further or other answer to the said bill and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

Dated August 29, 1904.

H. VAN GIESON,
(Sgd.) By His Attorneys, ROBERTSON & WILDER.

I hereby certify that I am one of the attorneys for the defendant H. Van Gieson, in the above entitled cause; and that the foregoing demurrer is not interposed to delay the said cause or any proceedings therein.

(Sgd.) A. A. WILDER.

44 Title of Court and Cause.

Answer of H. Van Gieson, Defendant to the Bill of Complaint of C. B. Maile, Plaintiff.

This defendant, now and at all times hereafter, saving and reserving unto himself all benefit and advantage of exception which may be had or taken to the manifold errors, uncertainties and other imperfections in the plaintiff's said bill of complaint, for answer thereto, or unto so much and such parts thereof as this defendant is advised is or are material to be answered unto, this defendant for answering says:

1. That he admits the allegations contained in paragraph 1 of said bill of complaint.

2. That he denies that C. B. Maile is now or has been since July 5, 1904 the owner of those parcels of land described in paragraph 2 of said bill of complaint, and that he admits the other allegations contained in said paragraph 2.

3. That he neither admits nor denies the allegations contained in paragraph 3 of said bill of complaint and leaves plaintiff to his proof thereof.

4. That he admits the allegations contained in paragraph 4 of said bill of complaint.

5. That he is informed and believes that the allegations contained in paragraph 5 of said bill of complaint are true and therefore admits same.

6. That he denies the allegations contained in paragraph 6 of said bill of complaint, and alleges the truth to be that C. B. Maile was duly served with said complaint and summons as provided by law by this defendant in his capacity as a police officer, having delivered to said C. B. Maile at the fish market in Honolulu, Island of

Oahu, Territory of Hawaii, on December 7, 1903, a true copy
45 of the original complaint and summons described in said paragraph 6 and at the same time and place by showing the said C. B. Maile, the original of said complaint and summons. That this defendant, in making his return of service on said C. B. Maile to said District Court of Honolulu through inadvertence and oversight omitted to set out in said return the fact that he had shown the said C. B. Maile the original of said complaint and summons at the time of delivering to him a true copy of same.

7. That he neither admits nor denies the allegations contained in paragraph 7 of said bill of complaint, and therefore, leaves plaintiff to his proof thereof, except that he is advised that C. B. Maile was subject to the jurisdiction of said district court.

8. That he neither admits nor denies the allegations contained in paragraph 8 of said bill of complaint, and therefore, leaves plaintiff to his proof thereof.

8A. That he admits the allegations contained in paragraph 8A of said bill of complaint.

9. That he admits the allegations contained in paragraph 9 of said bill of complaint, except that he neither admits nor denies the allegation that James W. Pratt was not then at all interested in said proceedings or said judgment.

10. That he denies all the allegations contained in paragraph 10 of said bill of complaint, except the first allegation thereof that the High Sheriff advertised a notice of levy and sale of certain real estate of said C. B. Maile, which said first allegation he admits.

11. That he neither admits nor denies the allegations contained in paragraph- 11, 12, and 13 of said bill of complaint, and therefore, leaves plaintiff to his proof thereof.

46 12. That he admits the allegations contained in paragraph 14 of said bill of complaint.

13. That he admits all the allegations contained in paragraph 15 of said bill of complaint, except that he denies the last allegation thereof, that he knew all the facts theretofore set forth in said bill of complaint.

14. That he admits all the allegations contained in paragraph 16 of said bill of complaint except that he neither admits nor denies that fully one half of the persons present at said sale were members and attaches of the police force of Honolulu, and leaves plaintiff to his proof of said last allegation.

15. That he neither admits nor denies the allegations contained in paragraph 17 of said bill of complaint, and therefore leaves plaintiff to his proof thereof, except that he admits the prices for which the said pieces of land were sold.

16. That he denies the allegation contained in paragraph 18 of said bill of complaint that said sale was unfairly and illegally conducted and alleges the truth to be that said sale was fairly and legally conducted. And that he neither admits nor denies the other allegations contained in said paragraph 18, and therefore leaves plaintiff to his proof thereof.

17. That he denies all the allegations contained in paragraph 19

of said bill of complaint, and alleges that on said July 5, 1904, he paid the full amount of all his bids.

18. That he neither admits nor denies the allegations contained in paragraph 20 of said bill of complaint, and, therefore, leaves plaintiff to his proof thereof.

19. That he admits the allegations contained in paragraph 21 of said bill of complaint, except that he neither admits nor denies as to what said decision and decisions were founded and based on, and as to said allegation he leaves plaintiff to his proof thereof.

47 20. That he denies all the allegations contained in paragraph 22 of said bill of complaint.

21. That in answer to the allegations contained in paragraph 23 of said bill of complaint, he says that on the 5th day of July 1904, and ever since said date, he was and is acting solely for himself and for no other person, and that he caused the deed of the lands bought by him to be made to him personally and individually.

22. That in answer to paragraph 24 of said bill of complaint he denies that the said deed and record thereof constitute and operate as a cloud upon the title of plaintiff and says that since July 5, 1904, plaintiff has had and has now *on* title to said premises, and that he admits the other allegations in said paragraph 24 contained.

23. That he denies all the allegations contained in paragraphs 25 and 26 of said bill of complaint.

24. That further answering said bill of complaint, he says, that he is informed and believes and alleges on such information and belief that sometime after January 7, 1904, Lyle A. Dickey Esq. First District Magistrate of Honolulu, issued an alias writ of execution in said cause of Pratt *vs.* Maile, against the personal or real property of said C. B. Maile; that in pursuance of said alias execution the High Sheriff levied on certain real property of said C. B. Maile, and advertised the same for sale according to law; that prior to the sale of said real estate under said alias execution, said alias execution was withdrawn and cancelled by the attorney for said Pratt and so returned to said First District Magistrate, for the reason, that one John F. Colburn claiming to act for said C. B. Maile, promised the attorney for the plaintiff in said action that said judgment would be paid but that said judgment never was so paid.

48 This defendant further says that plaintiff does not come into equity offering to do equity and that plaintiff has never offered or tendered him the amount paid by him for the lands bid in by him at said date.

Wherefore he prays that said bill be dismissed with costs.

Dated September 10, 1904.

(Sgd.) H. VAN GIESON.

(Sgd.) ROBERTSON & WILDER,
Attorneys for H. Van Gieson.

Duly verified September 10th, 1904, before A. A. Wilder.

49 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers. In Equity.

C. B. MAILE
vs.
J. W. PRATT ET AL.

Oral Decision.

This is a bill filed by the petitioner, C. B. Maile to have the sale of the premises in question declared void and to have the deed set aside.

In reaching a proper conclusion in this matter it becomes necessary to consider the various points which have been urged by counsel on both sides and the first of those points is the question as to the validity of the service of the summons upon Mr. Maile as defendant, in the suit of Mr. J. W. Pratt tax assessor, for the amount of taxes claimed to be due. I will dispose of that by simply stating that, in my opinion, the service was valid and that the court thereby obtained jurisdiction over the person of the defendant.

The next question in its order according to the argument of counsel is the question as to alias executions. In my opinion the alias execution was valid and proper.

The next question argued by counsel for petitioner was that, while the suit was instituted for the collection of the taxes by Mr. Pratt as tax assessor, at the time the alias execution was issued he had ceased to be such assessor, and for that reason the execution would be null and void. I do not feel that that contention can be supported.

50 The next question in order namely, the order of the district magistrate recalling the execution, and the sheriff's sale, I shall pass that for the moment and take up other phases of the question, considering that last. This then brings us to the question of levy. It seems from the authorities that there are various modes of making a levy in the different states, some describing one way and some another. It appears from some of the authorities that a levy upon real estate is made by the officer going upon the land and exercising some act of possession or control over it, some by posting certain written notices on the land, others by endorsing the description of the land upon the execution, and some I believe, by recording the execution with the registrar of deeds or the recorder of deeds, and still another by the mere notice of sale. The last was the method pursued in this case. The sheriff simply advertised the property for sale and posted the notices up, a copy of one being part of the record. I feel that, under the law and the practice that has prevailed in this jurisdiction that is a levy.

Then we come to the question of inadequacy of consideration. There is no question but what the consideration paid is inadequate as compared with the value of the property, but whether or not it is such an inadequacy or whether or not the fact that it is inadequate is a fact that the petitioner in this case can take advantage of, is to

be determined from a consideration of other facts involved in the case.

It is alleged in the bill paragraph 17 that one of the chief reasons of the inadequacy of the price was because the petitioner appeared there by his counsel and warned the purchasers that the district magistrate had made an order quashing the execution or staying the writ, and that the judgment was null and void. That of course could have no other tendency than to intimidate those who had any idea of purchasing and to prevent the sale for an adequate price. It seems to me, for that reason alone, that the petitioner is in no position to complain of the inadequacy of the price for which the land sold. It is largely, if not almost entirely, caused by his own conduct. Furthermore it is a well known fact, that land or property of any description sold at execution sales rarely sells for anything at all like its value.

51

Now as to the order made by Judge Lindsay made on the theory, as I understand the contention of counsel, that the service of process was illegal and that the judgment rendered thereon was null and void, hence his motion asking a stay of the execution and a postponement of the sale. Now as I view the matter his motion was not well-founded and the judgment was valid, and that being the sole reason for a stay of execution it turns out that as a matter of fact there was no reason or occasion for it, and I think that view may be very well advanced regardless of the other phase of the matter, namely, whether or not the district magistrate has power to make such order as he did in this case. I am inclined to the opinion that the district magistrate, as a judge of any other court, has power over his process and may withdraw it, or attempt to do so or do what would amount to that. The sheriff, however, saw fit to ignore that and proceed with the sale, so for that reason, it seems to me that the sale would have to be considered valid. J. B.

As to the purchase of the property by Mr. Van Gieson I am safe in saying that the evidence in no way shows that he had anything to do with the sale. He was a police officer and stenographer and clerk working for Mr. Brown, the High Sheriff, and it does not appear in evidence that there was any understanding or any agreement between Mr. Brown and Van Gieson prior to the sale making arrangements for the purchase price, but that Mr. Van Gieson proceeded to purchase the property on his own volition and, after he had made the purchase and it was knocked down to him, then he made his arrangements with Mr. Brown for the money. Now if Mr. Van Gieson as the police officer, not in any way connected with the sale, had a right to purchase that property, then the sale was valid at the time it was knocked down to him, and the fact that after the sale had been completed legally to all intents and purposes up to that point, he borrows or makes any arrangements with Mr. Brown for the money to pay for the property could not vitiate that which was legal up to that point. I might say that it does not show good taste, and it seems to me that officers ought to avoid purchasing at a sale of that kind, although he has a legal right to do so; but if the legal right is there mere impropriety or in-

52

delicacy cannot operate to bring the court to a conclusion to set the sale aside.

Now there are other features in this matter tending to strengthen my view that the sale ought not to be set aside. Mr. Maile has testified that he had the money to pay his taxes with; that he was ready to pay them—Mr. Colburn had $475 or about that amount as his agent and that he had the balance; he was served with process, and waited upon by Mr. Van Gieson any by Waipa, whom I understand to be Captain Parker, notified of the fact of execution having issued and requested to call upon Mr. Brown which Mr. Maile did, and there the matter of taxes and the amount of the taxes was discussed. Mr. Maile departed, saying that he would think the matter over and decide later what he would do, and he never notified Brown of his conclusion in the matter. It seems that Mr. Andrade, representing the Treasurer, called upon Mr. Colburn many times and
53 demanded the taxes, and was repeatedly refused. The first execution was issued and withdrawn upon the promise by Mr. Maile or his agents that he would pay but wanted more time. The second execution likewise was withdrawn, and I believe the sale which was advertised to take place under the third execution was postponed at least once.

Now it seems to me that there was nothing left for the government to do but to proceed with the sale. It is a well established rule of law that the government must live; it can only survive and perform its functions through its power of taxation. The courts in these matters of course always feel the harshness with which these measures bear on the taxpayer; the sympathy of the judge and all concerned is always with the taxpayer, but no court is worthy of its name and fit to perform its duties that will allow its judgment to be warped or influenced by anything other than the law and the evidence applicable to the facts before it. Mr. Maile had this fully in his own hands and his own power; he could have paid his taxes and it was his plain, absolute duty under the law to pay them. Of course, as his counsel argues, he felt that the suit instituted against him was not well-founded; that he had the right, as any other citizen has, to contest that. But there has not been a whisper of any irregularity or illegality in the assessment of the taxes; I have heard of none and therefore I presume that there has never been any question as to the legality of the taxes in any way. Then, if there was no illegality or irregularity in the assessment, his view that he was not legally served and that he felt the court did not have jurisdiction does not help him much in the matter, there still remained his plain duty to pay the taxes, which he did not question, and the mere contention that the service of process upon him was improper illegal or
54 void appears to me captious or technical.

In answer to Mr. Ashford's request for an expression of the court's views as to whether it considers the service in question regular because the statute is satisfied when a copy only is served, or whether the court believes the testimony of Mr. Van Gieson to the effect that at the time of service he not only handed a copy to the defendant but also showed him the original, I am strongly inclined

to the opinion that the mere handing of a copy of the summons to the defendant is sufficient, but in this case Mr. Maile was not very clear although he did testify that he only saw one paper and that was the one which Mr. Van Gieson gave him; that was practically his testimony. Mr. Van Gieson, of course, is absolutely positive that he not only gave him the copy but showed him the original, and if it is necessary to hold that that additional fact should exist to make this a valid service, I must find that that fact has been established. And I think it was proper to show that, this being a court of equity; I think that the court is entitled to all the facts, and if, as a matter of fact, Mr. Van Gieson did serve the defendant in that way, by handing him a copy of the summons and at the same time showing him the original, then that fact existed and it does the petitioner no injustice to show that fact. I am strongly inclined to the opinion that we must always, in determining whether or not there has been service, clearly distinguish between the return of the officer and what the officer has done. If, when the officer goes with process to serve upon the defendant, he performs his full duty, his service is complete and valid in every respect, it seems to me right then and there, before he writes a syllable of his return, the court has acquired jurisdiction, and I am inclined to believe that even though there
55 was no written return at all the court would have jurisdiction. Of course, if we should take up that whole record at some subsequent period and look at it and find there is no return there or evidence of any service, the court would be justified and it would be its duty to reach the conclusion that there was no service and any judgment based upon any such summons would be null and void upon its face, but I think it is always proper to supply that deficiency and that an officer not only has the right, for his own protection, to come in and show just what the facts are, but I believe that it is his duty to do so. I think right there is where a great deal of confusion comes about; that in many of these cases where the record has been examined at some subsequent time in some other court, the appellate court, the decision of that court at that time was based upon the record as they found it and their conclusion necessarily would be correct; if the return of the officer did not show all those facts essential to constitute valid service it follows as a matter of course that there could be no other conclusion of the court than that the service was incomplete and invalid. 1 Freeman on- J. B. Judgments Sec. 89*b*.

The decree will be signed in accordance with these views. The bill is dismissed.

(Sig.) J. T. DE BOLT,
First Judge.

56 Title of Court and Cause.

Decree.

And now on this fourth day of January A. D. 1907 this cause coming on to be heard before me, C. W. Ashford appearing for the plaintiff and Messrs. Magoon & Lightfoot appearing for the defend-

ants, and the pleadings, proofs and the arguments of respective counsel having been heard and considered, and the court being fully advised in the premises,

It is hereby ordered, adjudged and decreed that plaintiff's bill be, and the same is hereby dismissed, with costs taxed at $22.50.

Done at Chambers this 10th day of January A. D. 1907.

(Sgd.) J. T. DE BOLT,
First Judge, First Circuit Court.

57 Title of Court and Cause.

Plaintiff's Notice of Appeal.

And now comes the said plaintiff by his attorney C. W. Ashford and gives notice that he will appeal and he does hereby appeal to the Supreme Court of the Territory of Hawaii, from the Decree signed by the Honorable the First Judge of said Circuit Court, at Chambers in the above entitled cause, and dated and filed the 10th day of January, 1907.

Dated this 11th day of January, 1907.

(Sgd.) C. W. ASHFORD,
Attorney for Plaintiff.

Endorsed: Eq. 1423. Reg. 1/156. Circuit Court First Circuit, Territory of Hawaii. At Chambers. C. B. Maile *vs.* J. B. James W. Pratt, Assessor, &c. Notice of Appeal. Filed 3:40 P. M. Jan. 11th, '07. L. P. Scott, Clerk. C. W. Ashford, Attorney for Plaintiff.

58 Vol. 2, Chambers Minutes, Third Judge.

Pages 255-263-265-267-268.

Title of Cause.

E. 1423. 22/50.

Tuesday, August 23, 1904, p. 255.

Pursuant to stipulation in open Court by and between counsel for the respective parties, (C. W. Ashford, Esq., for plaintiff, and A. A. Wilder, Esq., for defendants) it is ordered that the Order to show cause herein, set for 10 o'clock a. m. this day, be continued until Tuesday the 30th day of August, A. D. 1904, at 10 o'clock a. m., and that the restraining order heretofore issued herein be continued in force until such hearing.

Title of Cause.

E. 1423. 22/50.

Tuesday, August 30, 1904, p. 263.

By consent of counsel and order of the court, hearing of the order to show cause herein continued until 10 o'clock a. m. this day, is further continued until Wednesday, August 31, A. D. 1904, at 10 o'clock a. m., and the restraining order heretofore issued herein is continued in force until such hearing.

Title of Cause.

E. 1423. 22/50.

Wednesday, August 31, 1904, p. 265.

By consent of counsel and order of the court, hearing of the order to show cause herein continued until 10 o'clock a. m. this day, is further continued until Thursday, September 1, A. D. 1904, at 10 o'clock a. m., and the restraining order heretofore issued herein is continued in force until such hearing.

59 Title of Cause.

E. 1423. 22/50.

Thursday, September 1, 1904, p. 267.

Came on to be heard at 10 o'clock a. m. this day the order to show cause why there should not issue herein a temporary injunction, such as is prayed for by plaintiff in his bill of complaint herein, C. W. Ashford, Esq., appearing as attorney for plaintiff; Frank Andrade, Esq., appearing as attorney for defendant James W. Pratt, and A. A. Wilder, Esq., appearing as attorney for defendant H. Van Giesen.

Mr. Ashford reads the bill of complaint.

By consent of counsel allegation No. 11 of plaintiff's bill of complaint is amended by striking out (in the second line of said allegation No. 11) the words "said defendant Pratt," and inserting in lieu thereof the words "your Orator."

By consent of counsel allegation No. 24 of plaintiff's bill of complaint is amended as follows: By inserting the date 5th On the first of said allegation No. 24, also by striking out the word "Trustee" in the fourth line of said allegation No. 24. M. T. S.

Mr. Wilder reads demurrer of H. Van Giesen to plaintiff's bill of complainant and argues.

Upon motion of Mr. Wilder the court orders that the name of

Frank Andrade, Esq., be entered on record as associate counsel for defendant H. Van Giesen.

Mr. Andrade argues on the demurrer of H. Van Giesen.

Mr. Ashford argues.

Mr. Wilder replies.

Mr. Wilder reads return of H. Van Giesen to order to show cause why a temporary injunction not issue.

The Court thereupon orders:

60 "The demurrer is overruled with leave to answer within ten (10) days from this date."

It is further ordered that a temporary injunction issue in accordance with the prayer of the bill of complaint, upon plaintiff giving bond in the sum of Five Hundred ($500.00) Dollars with one or more sureties to be approved by the court, conditioned for the payment to defendant H. Van Giesen of all costs or damages he may sustain by reason of such temporary injunction in the event that the same shall be finally dissolved upon final hearing.

It is further ordered by consent of counsel that the defendant James W. Pratt be and he is hereby allowed ten (10) days from and after this date in which to answer or demur to plaintiff's bill of complaint herein.

61 In the Circuit Court of the First Circuit, Territory of Hawaii.

C. B. MAILE
vs.
JAMES W. PRATT ET AL.

Assumpsit.

Copy of Minute Orders of the First Judge of Said Court Upon the Trial Thereof.

Chambers Record, Monday, December 31st, 1906, Page 249.

Mr. C. W. Ashford for plaintiff.

Messrs. J. A. Magoon and J. L. Lightfoot for Henry Van Giesen, defendant, &c.

J. L. Horner Stenographer.

Mr. Ashford made a statement, argued and asked that the prayer of the petition be granted, viz, that the sale be set aside.

Mr. J. W. Pratt not being present either in person or represented by counsel was call- three times by the Bailiff.

Mr. Lightfoot read Answer to bill.

A. M. Brown, sworn.

James L. Holt, sworn.

Court adjourned at 12 o'clock noon until 2 P. M.

Afternoon Session, 2 p. m.

All same parties present.

James L. Holt resumed the stand.

Eugene Aiu, sworn.

District Court Record No. 213 James W. Pratt *vs.* C. B. Maile 1903 was put in evidence and marked Plaintiff's Exhibit A.

Entry on pages 476 and 477 of the District Court Record Vol 2 June 30th 1904 J. W. Pratt *vs.* C. B. Maile was read as evidence and known as plaintiff's Exhibit B.

Entry in District Court Record in Vol. 10 on pages 273 and
62 338 July 6th, 1904 and August 15th 1904 was read as evidence and known as plaintiff's Exhibit C.

J. A. Magoon, sworn.

C. B. Maile, sworn.

Court adjourned at 4 p. m. until Wednesday January 2nd, 1907 at 10 A. M.

Wednesday, January 2nd, 1907, 10 a. m., P. 253. Eq. 1423.

C. B. MAILE
vs.
J. W. PRATT.

Same counsel and stenographer present.

C. B. Maile resumed the stand.

Mr. Ashford argues and quotes authorities.

Mr. Magoon argues.

Mr. Lightfoot argues and quotes authorities.

Court adjourned at 12 o'clock Noon until 2 P. M.

Afternoon Session, 2 p. m.

All same parties present.

C. B. Maile resumed the stand.

Henry Van Giesen, sworn.

Court adjourned at 4 P. M. until Thursday January 3rd, at 10 A. M.

(Sig.) JOB BATCHELOR, *Clerk.*

Thursday, January 3rd, 1907, 10 a. m., P. 254. Eq. 1423.

C. B. MAILE
vs.
J. W. PRATT.

Bill to Set Aside Deed.

Same counsel and stenographer present.

Mr. Ashford moved for leave to further amend bill of complaint to include paragraph 15A and attach same to bill of complaint.

Court grants the motion.

63 Henry Van Giesen resumed the stand.

Mr. Ashford moved to discontinue as to defendants John Doe and Richard Roe.

Court grants the motion.

C. W. Ashford, sworn.

Alexander Garvie, sworn.

A receipt dated November 9th, 1906 for $652.65 signed by A. M. Brown was put in evidence and marked plaintiff's Exhibit D.

Plaintiff Rests.

Henry Van Giesen resumed the stand, and was withdrawn again, and

Frank Andrade was sworn.

Mr. Alexander Garvie again appeared in Court and asked to be allowed to correct a statement regarding a date.

Court allowed him to make the correction thereupon he stated that the note form $500.00/00 was dated the 7th instead of the 17th.

Henry Van Giesen resumed the stand.

Court adjourned at 11:55 A. M. until 2 P. M.

Afternoon Session, 2 p. m.

All the same parties present.

Court read an authority.

Mr. Magoon argues and quotes authorities.

Mr. Ashford quotes authorities and argued.

Henry Van Giesen resumed the stand.

Defendant Rests at 3:40 P. M.

C. B. Maile recalled on rebuttal.

Salmon License dated July 2nd, 1904, No. 1095 C. B. Maile was put in evidence and marked plaintiff's Exhibit E.

Koolau Maile, sworn.

64 Court adjourned at 4:22 P. M. until Friday January 4th, at 9:30 A. M.

Friday, January 4th, 1907, 9:30 a. m., P. 257. Eq. 1423.

C. B. MAILE
vs.
J. W. PRATT.

Same counsel and stenographer present.

Mr. Ashford argued.

Mr. Lightfoot argued and quotes authorities.

Counsel in open Court stipulated that the amount of taxes realized upon the Alias Execution and actually paid unto the Territory Treasury was $449.00 and further during the period from the date of sale of said land under said Alias Execution the rent thereof "Alakea St. piece" has amounted to the sum of $510.00 the taxes have accrued since said [date]* under said execution and J. B. are unpaid.

sale

Court adjourned until 1:30 P. M.

Afternoon Session, 1:30 p. m.

All same parties present.

Mr. Ashford again asked that he be allowed to further amend the bill of complaint by inserting words to follow paragraph 28 on page 17 of the bill.

Court granted the request and ordered the Clerk to insert the same.

Mr. Lightfoot argued.

Mr. Magoon argued.

Mr. Ashford argued.

Court rendered oral decision and ordered the bill dismissed. Decree will be signed accordingly.

Court adjourned at 5:30 P. M.

Wednesday, January 9th, 1907, 9 a. m., P. 259. Eq. 1423.

C. B. MAILE
vs.
J. W. PRATT.

Bill to Set Aside Deed.

65 Before the Hon. J. T. De Bolt, First Judge.

Same counsel and Stenographer present.

Taxing Costs.

Mr. Ashford objected to several items in bill of costs.

Cause continued until Thursday January 10th, 1907 at 9 A. M.

Thursday, January 10th, 1907. Eq. 1423. 9 a. m.

C. B. MAILE
vs.
J. W. PRATT.

Taxing Costs.

Mr. J. Lightfoot asked that bill of costs be allowed as per bill filed.

Court granted the request, costs taxed accordingly.

(Sig.) JOB BATCHELOR, *Clerk.*

66 Form 1-5 M-7-'01.

2167 1900
2424 1901
Book 5, No. —, pg. 172..... 1902

Summons.

In the District Court of Honolulu, Territory of Hawaii.

JAMES W. PRATT, Collector of Taxes,
vs.
C. B. MAILE.

Assumpsit.

Territory of Hawaii to the High Sheriff of the Territory of Hawaii; His Deputy, or any Policeman in the District of Honolulu, Island of Oahu, Greeting:

You are hereby commanded to summon C. B. Maile if he can be found in the District, to appear before me, at my office #64 Merchant St. in Honolulu, upon the 11th day of December, 1903, 1:30 o'clock P. M., there to answer unto James W. Pratt, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii, in a plea wherein the plaintiff declares and says:

That said defendant C. B. Maile is lawfully indebted to the plaintiff, in his official capacity aforesaid, in the sum of four hundred eighty six & 60/100 $486. 60/100 Dollars for Taxes assessed against the person and property of said defendant, on the books of the Assessor of Taxes for the District of Honolulu, Island of Oahu, for the year 1900-1-2. And defendant, though thereunto requested, has thus far failed and neglected, and still doth neglect and refuse to pay the same, or any part or portion thereof; wherefore, plaintiff asks for judgment against said defendant for said sum of four hundred eighty six & 60/100 $486 60/100 Dollars, together
67 with ten per cent. and costs of advertising in addition thereto as by law provided, and for costs of Court.

Notify the said C. B. Maile that upon default to attend at the place, day and hour above mentioned, judgment will be rendered against him *ex parte*, by default.

Given under my hand this 7th day of December, 1903.

(Sgd.) LYLE A. DICKEY,
District Magistrate of Honolulu, Territory of Hawaii.

ISLAND OF OAHU, *District of Honolulu, Territory of Hawaii, ss:*

Personally delivered a true copy of the within Summons to the within named C. B. Maile as directed, this 7th day of December, 1903.

(Sgd.) H. VAN GIESON,
Police Officer.

Endorsed: 213. Book —. No. —. District Court of Honolulu. Territory of Hawaii. James W. Pratt, Collector of Taxas, *vs.* C. B. Maile, ——, 1903. Frank Andrade Stangenwall Building, Attorney for Plaintiff.

68 In the District Court of Honolulu, Island of Oahu.

JAMES W. PRATT, Collector of Taxas, Plaintiff.
vs.
C. B. MAILE, Defendant.

Motion of Defendant to Quash and Set Aside Service of Summons and to Restrain Execution Sale.

And now comes the said defendant C. B. Maile by C. W. Ashford his Attorney, and respectfully moves the Court that the service of summons made, or pretended to have been made upon him in the above entitled action, on, to wit, the 7th day of December, 1904, be quashed and set aside, for the reason that such service was not made in manner and form as provided by law, and for the further reason that said defendant did not thereafter, and never did appear before said Court and submit to the jurisdiction thereof, by pleading or demurring to the Complaint herein, or otherwise, or at all.

And defendant further moves for a temporary restraining order forbidding said plaintiff, and the High Sheriff of said Territory to proceed any further with the sale of the property of the defendant herein, under any execution, or alias execution issued in this behalf, until the further order of this Court shall be made known concerning the motion here made.

This motion is based upon the original complaint and summons herein, and upon the return of service thereof endorsed thereon; and upon the alias writ of execution issued herein, and now in the hands of the High Sheriff, and upon the advertisement and notice
69 of said High Sheriff of having levied upon and being about to sell the property of the defendant in pursuance of said alias writ of execution, and upon all other the records and files in this cause.

Dated this 1st day of July, 1904.

(Sgd.) C. W. ASHFORD,
Attorney for said Defendant.

Order.

Upon reading and filing the foregoing Motion It Is Ordered;

That the plaintiff herein, and the High Sheriff of the Territory do refrain from selling, pretending to sell, or exposing for sale any of the property, goods, chattels or effects of said defendant C. B. Maile under, or by virtue of any Writ of Execution or Alias Execution heretofore issued in the above entitled cause, until the further order of this Court in the premises,

And it is further ordered that said plaintiff do appear before the undersigned District Magistrate, at the Court-Room of said Court in Honolulu at 1:30 o'clock P. M. on Monday the 6th day of July, 1904, in response to the foregoing Motion, at which time and place, or as soon thereafter as counsel may be heard, the said Motion will be heard and entertained by the undersigned District Magistrate.

It is further ordered that service hereof may be made by leaving a copy of the foregoing motion and of this order with the High Sheriff of the Territory, or with any of his Deputies, or any other officer or person in charge of the office of said High Sheriff, and by handing a further copy thereof to Frank Andrade, Esq., At-
70 torney for Plaintiff, or leaving the same at his office during the business hours of any day not less than twenty-four hours prior to the date herein set for the hearing of said Motion.

Dated this 1st day of July, 1904.

(Sgd.) ALEX. LINDSAY, JR.,
District Magistrate of Honolulu, Island of Oahu.

Endorsed: In the District Court of Honolulu. James W. Pratt, Collector of Taxes, *vs.* C. B. Maile. Motion to Set Aside Service of Summons, To Restrain Sale, &c. C. W. Ashford attorney for Defendant.

71 In pursuance of the within Alias Execution I did as follows: I first made due and diligent search within the Judicial District of Honolulu, Island of Oahu, Territory of Hawaii, for personal property belonging to the within named C. B. Maile, and not being able to find any such property within said Judicial District, I did, therefore, in Honolulu, Island of Oahu, Territory of Hawaii, on the 27th day of May, A. D. 1904, levy upon all the right, title and interest of the said C. B. Maile in and to all that real property described in the "Sheriff's Sale Notice" hereto attached, marked "Exhibit A," and made a part hereof, and to which reference is hereby made; and after advertising the sale of said interest in said real property for the period and in the manner required by law, to wit: by posting a "notice" of said "Sheriff's Sale" in three conspicuous places within the district where said real property was and is situated, to wit, in the district of said Honolulu, fully thirty days prior to the day appointed for the sale of said interest in said real property; and further, by causing publication of said "Sheriff's Sale Notice" to be made on four different dates in the Pacific Commercial Advertiser, a newspaper printed and published in the English language in said Honolulu, during a continuous period of fully thirty days prior to the day appointed for said sale; I did, at 12 o'clock noon of Tuesday, the 28th day of June, A. D. 1904, at the Police Station, Kalakaua Hale, in said Honolulu, that being the time and place appointed for said sale, by a public declaration, for good and sufficient cause, to wit, deeming it expedient, and for the interest of all persons concerned in the matter of said sale, postpone said sale for one week, to wit, to take place at 12 o'clock noon of Tuesday, the 5th day of July, A. D. 1904, at the said Police Station; and at
72 12 o'clock noon of Tuesday, the 5th day of July, A. D. 1904, at the said Police Station, I did offer for sale at public auction, to the highest bidder, all the right, title and interest of the said C. B. Maile in and to each of the premises hereinbefore referred to as real property, and which are hereinafter described. And I did then and there at such public auction sell said interest in said real property as follows:

First. All the right, title and interest of the said C. B. Maile in and to all those premises on makai side of Pauahi street, Honolulu, containing an area of 2241 square feet, being a portion of Royal Patent 226, Land Commission Award 783, and conveyed to C. B. Maile by W. C. Achi as of record in the Registry Office in said Honolulu in Liber 167, page 163; to Henry Van Gieson for twenty-five dollars, the said Henry Van Gieson being the last, highest and best bidder therefor;

Second. All the right, title and interest of the said C. B. Maile in and to all those premises on Alakea street, Honolulu, between Merchant and King streets, about 43 x 52 feet, conveyed to Maile by Kahuhu and Kapepehi by deed dated June 1st, 1879, as of record in said Office in Liber 58, page 341. Said premises being under lease to Chang See for 15 years from November 1st, 1895, at $204 per year; to Henry Van Gieson for three hundred and ten dollars, the said Henry Van Gieson being the last, highest and best bidder therefor;

Third. All the right, title and interest of the said C. B. Maile in and to those premises at Kawaiiki and Keoneula, Honolulu, described in Royal Patent 2460, conveyed to C. B. Maile by deed of L. Kamakaponiponi and husband, as of record in said Office in Liber 177, page 489, and containing 1 2/100 acres; to Henry Van Gieson for two hundred dollars, the said Henry Van Gieson being the last, highest and best bidder therefor.

Endorsed: (Sgd.) A. M. Brown, High Sheriff Territory of Hawaii.

73 And having realized the sum of five hundred and thirty-five dollars from said sale I have disposed of the same as follows:—

Sheriff's Fee	$29.25
Discription of said property	20.00
Advertising said sale	36.60
Paid to Alex. Lindsay, Jr., District Magistrate of said Honolulu, the net proceeds of said sale amounting to	449.15
Total	$535.00

Therefore, the within Alias Execution is returned partially satisfied this 5th day of July, A. D. 1904.

In Witness Whereof, I do unto this "Return," consisting of two pages, the first of which is signed by me on the back, set my hand this 5th day of July, A. D. 1904, at said Honolulu.

(Sgd.) A. M. BROWN,
High Sheriff, Territory of Hawaii.

74 "EXHIBIT A."

Sheriff's Sale Notice.

Under and by virtue of a certain Alias Execution issued by Lyle A. Dickey, District Magistrate of Honolulu, Island of Oahu, Territory of Hawaii, on the 25th day of May, 1904, in the matter of Jas. W. Pratt, Collector of Taxes First Division, *vs.* C. B. Maile, I have, in said Honolulu, on this 27th day of May, A. D. 1904, levied upon, and shall offer for sale and sell at public auction, to the highest bidder, at the Police Station, Kalakaua Hale, in said Honolulu, at 12 o'clock noon of Tuesday, the 28th day of June, A. D. 1904, all the right, title and interest of the said C. B. Maile in and to all the following described real property, unless the sum of Five Hundred and Forty-two and 11/100 Dollars, that being the amount for which said Alias Execution issued, together with interest, costs and my fee and expenses are previously paid:—

First.

All those premises on makai side of Pauahi street, Honolulu, containing an area of 2241 square feet, being a portion of Royal Patent 226, Land Commission Award 783, and conveyed to C. B. Maile by W. C. Achi as of record in the Registry Office in said Honolulu in Liber 167, page 163.

Second.

All those premises on Alakea street, Honolulu, between Merchant and King Streets, about 43 x 52 feet, conveyed to Maile by Kahuhu and Kapepehi by deed dated June 1st, 1879, as of record in said Office in Liber 58, page 341. Said premises being under lease to Chang See for 15 years from November 1st, 1895, at $204 per year.

75 Third.

All those premises at Kawaiiki and Keoneula, Honolulu, described in Royal Patent 2460, conveyed to C. B. Maile by deed of L. Kamakaponiponi and husband, as of record in said Office in Liber 177, page 489, and containing 1 2/100 acres.

Dated at said Honolulu, this 27th day of May, A. D. 1904.

(Sgd.) A. M. BROWN,
High Sheriff, Territory of Hawaii.

76 In the District Court of Honolulu, Island of Oahu.

JAMES W. PRATT, Collector of Taxes, Plaintiff,
vs.
C. B. MAILE, Defendant.

Defendant's Motion to Vacate and Set Aside Sale of Property Under Execution Herein.

And now comes the said defendant by C. W. Ashford his Attorney, and moves the Court that an order be entered herein, setting aside and

vacating the sale of the property of this defendant held and made by the High Sheriff of the Territory on Tuesday, the 5th day of July, 1904, he, the said High Sheriff, purporting and pretending to act in the premises under the mandate of a certain Alias Writ of Execution issued in said cause, under the hand of Lyle A. Dickey, then District Magistrate of said District, and dated on or about the 25th day of May, 1904, for the reasons hereinafter stated;

1. That the District Court aforesaid never obtained jurisdiction of the person of said defendant in the matter of said cause, prior to the rendition by said District Court of the judgment whereon said Alias Writ of Execution is based.

2. That, at the time of the said sale being held, there was in effect and outstanding, an order, made by the District Magistrate of said District in said cause, dated July 1st, 1904, and directed to said High Sheriff and to said plaintiff, forbidding said High Sheriff, and said plaintiff, and each of them, to sell or attempt to sell any of
77 the property of said defendant under the mandate of said Alias Writ of Execution until the further order of said District Court should be made in the premises, and which said order had been theretofore, to-wit, on said 1st day of July, 1904, duly and regularly served upon said High Sheriff and upon Frank Andrade, Esq., the Attorney for said plaintiff in said cause, in manner and form as provided in said order, and that, at the time of said sale being so held, the said order had not been rescinded or modified, or set aside, or rendered ineffective.

3. That said Alias Writ of Execution was not levied or executed according to the mandate thereof in this, that said High Sheriff did not, as therein commanded first levy upon and sell, or levy upon or sell the personal property, or any of the personal property of said defendant, before levying upon the real property of said defendant.

This Motion is based upon all and singular the records and files herein, including the original Complaint and Summons, and the return of service endorsed thereon by the officer purporting to have served the same, and upon the affidavits of C. W. Ashford and J. F. Colburn and C. B. Maile hereto attached.

Dated this 6th day of July, 1904.

(Sgd.) C. W. ASHFORD,
Attorney for Defendant.

78 To the above named Plaintiff, and to Frank Andrade, Esq., his Attorney, and to H. Van Gieson, Trustee.

GENTLEMEN: You and each of you will please take notice that the foregoing Motion will be presented before Alexander Lindsay, Jr. Esq., District Magistrate of the District of Honolulu, at his Court-Room in said Honolulu, at 1:30 o'clock P. M. on Monday, the 11th day of July, 1904, or as soon thereafter as counsel may be heard.

Dated this 6th day of July, 1904.

(Sgd.) C. W. ASHFORD,
Attorney for Defendant.

Order.

It is hereby ordered that service of the foregoing Motion, and Notice of hearing thereof, may be made by handing a copy to H. Van Gieson, Esq., and by handing a copy thereof to Frank Andrade, Esq., Attorney for Plaintiff, or by leaving such copy intended for said Attorney for Plaintiff, in his office, during business hours, such service to be made not later than noon on Saturday the 9th day of July, 1904, and that the said Motion may be heard at the time indicated in said order.

Dated this 6th day of July, 1904.

(Sgd.) ALEX. LINDSAY, JR.,
District Magistrate of Honolulu, Island of Oahu.

79 In the District Court of Honolulu, Island of Oahu.

JAMES W. PRATT, Collector of Taxes, Plaintiff,
vs.
C. B. MAILE, Defendant.

Affidavit of C. W. Ashford.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

C. W. Ashford having been duly sworn, deposes and says: That he is the attorney for the defendant in the above entitled cause. That on Friday, the 1st day of July, 1904, at about 1:30 o'clock in the afternoon of said day, this deponent left a true and exact copy of the order signed on said day by the said District Magistrate, wherein and whereby any sale of the property of said defendant was and is forbidden, until the further order of said Court in the premises, together with a true and accurate copy of defendant's motion to set aside service of summons herein, with H. M. Dow, Esq., the Clerk to said High Sheriff, in the office of said High Sheriff in Kalakaua Hale in said Honolulu, he, the said Dow, being then and there the person in charge of said office of said High Sheriff, and then and there called the attention of said Dow to the character of the contents of said Motion and Order; and that thereafter, on said day, on Merchant Street in said Honolulu, at about the hour last aforesaid, this deponent personally handed to Frank Andrade, Esq., the attorney
for plaintiff in said c[illegible], a like true and accurate copy of
80 said motion, and of said order, and called said Andrade's attention to the character thereof, and informed said Andrade that said motion would be heard before said District Court at 1:30 o'clock P. M. of Wednesday, July 6, 1904.

That during the forenoon of Tuesday the 5th day of July, 1904, the defendant herein, C. B. Maile, informed this deponent, at deponent's office, that he, said defendant, had been notified
N. F. by a messenger sent by the High Sheriff on said last mentioned date, that his, said defendant's property would be sold at noon of said 5th day of July, 1904, according to the Alias

Execution issued herein, and according to the adjournment of said sale from the 28th day of June, 1904.

That because of said last mentioned notice this deponent attended in person at the front door of Kalakaua Hale in said Honolulu, at 12 o'clock noon on said 5th day of July, 1904, and, when said High Sheriff through the medium of James F. Morgan, Esq. an auctioneer, proclaimed and exposed for sale the property of said defendant as set forth in the notice of levy and of sale attached to said Alias Execution, and which is made a part of the motion to set aside the service of Summons herein, (to which said notice and its contents reference is hereby especially made), this deponent entered and made a public protest against the holding of such sale, and the selling of any of said property, and then and there informed the persons there assembled, including said High Sheriff, and said auctioneer, that said sale had been enjoined and forbidden by an order of this Court theretofore made and served upon said High Sheriff, and upon the attorney of said plaintiff, and then still pending and obtaining; and deponent then and there further stated to the persons there assembled that the judgment upon which said Alias Execution was based, had been obtained without jurisdiction, and that said defendant had never, prior to the rendering of such judgment, been
81 legally served with process or subjected to the jurisdiction of the Court by which said judgment was rendered, and that said judgment and said execution were wholly void, and that said sale if held in disobedience of said order would be wholly void, and that no title to any property so exposed, or pretended to be sold thereunder would pass to any person assuming to purchase the same.

And deponent further states that notwithstanding all and singular the facts aforesaid, said High Sheriff in person, did then and there in the hearing of this deponent instruct said auctioneer to proceed with said sale, and that the said auctioneer in obedience to said instruction did then and there cry and proclaim such sale of all and singular the parcels, three in number, of the real property
N. F. of said defendant mentioned in said notice of levy and of sale.

That the prices bid for said parcels, and of each and every thereof, were grossly inadequate, being less than ten per cent. (10%) of the value thereof respectively. That when said sale opened, and the first of said parcels was exposed for sale, there were not above ten persons present, of whom fully one-half were members and *attachees* of the Police force of Honolulu. That each of said parcels was bid off by, and knocked down to one H. Van Gieson a Police Officer upon said Police force, purporting to act in the premises as Trustee for some person or persons unnamed and unknown to this deponent. That said H. Van Gieson was present at the time when this deponent made his said protest, and heard all that deponent said upon said subject. That there were not at any time during the holding of said sale above twenty-five persons present in hearing of said auctioneer, and that fully one-half of the number so as-
82 sembled were members and attachees of the Police force of said Honolulu.

(Sgd.) C. W. ASHFORD.

Sworn to before me this 7th day of July, 1904.

(Sgd.) N. FERNANDEZ,
[NOTARIAL SEAL.] *Notary Public, Island of Oahu.*

83 In the District Court of Honolulu, Island of Oahu.

JAMES W. PRATT, Collector of Taxes, Plaintiff,
vs.
C. B. MAILE, Defendant.

Affidavit of John F. Colburn.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

John F. Colburn, being duly sworn, deposes and says:

That he has in charge certain of the business affairs of
N. F. said defendant. That he is and has for more than twenty years last past been a resident of the City of Honolulu, and is familiar with land values therein, and in particular that he is familiar with the lands mentioned in the notice of sale of the High Sheriff upon the Alias Execution in this cause, and which were sold by the High Sheriff on the 5th day of July, 1904; and is also aware from personal inspection of the figures at which said lands have respectively been assessed during several years last past. That the first of said parcels, to-wit, a parcel situated on Pauahi Street in Honolulu, has been assessed for several years last past upon the books of the Assessor for the District of Honolulu, at a valuation of Forty-seven Hundred and Sixty Dollars, ($4760.00). That the second of said parcels situated on Alakea Street in said Honolulu, was so assessed in the year 1901 for $10000.00; in the year 1902 for
84 $7500.00; in the year 1903 for $6000.00. That the third of said parcels, situated at Keoneula, has been assessed during each of the several years last past, including the year 1903, at the sum of $1000.00. And that this deponent believes that each of said parcels is worth fully the amount at which it was so assessed for the year 1903.

That upon said sale, said first parcel was bid of- for the sum of Twenty-five Dollars, ($25.00); said second parcel for the sum of Three Hundred and Twenty Dollars, ($320.00); and said third parcel for Two Hundred Dollars, ($200.00). That said prices and each and every thereof were and are grossly inadequate for said property.

(Sgd.) JOHN F. COLBURN.

Sworn to before me this 7th day of July, 1904.

(Sgd.) N. FERNANDEZ,
[NOTARIAL SEAL.] *Notary Public, District of Honolulu, Island of Oahu.*

85 In the District Court of Honolulu, Island of Oahu.

JAMES W. PRATT, Collector of Taxes, Plaintiff,
vs.
C. B. MAILE, Defendant.

Affidavit of C. B. Maile.

TERRITORY OF HAWAII, *Island of Oahu, ss:*

C. B. Maile having been duly sworn deposes and says: That he is the defendant in the above entitled cause. That he has heard read the foregoing affidavit, hereto attached, of John F. Colburn, and knows the contents thereof, and that the various parcels of land mentioned in said affidavit were, on the 5th day of July, 1904, of the respective values in said affidavit set forth, to-wit, the parcel situated on Pauahi Street in said Honolulu of the value of $4760.00; parcel situated on Alakea Street in said Honolulu of the value of $6000; and the parcel situated at Keoneula of the value of $1000.

That at all times since the date of the Alias Execution herein to-wit, the 25th day of May, 1904, this deponent has been a resident freeholder and householder of the City of Honolulu, Island of Oahu, and has had and owned personal property of large value at said Honolulu, to-wit, of the value sufficient to have satisfied said Alias Writ of Execution; but that the High Sheriff of the Terri-

86 tory did not, nor did any of his deputies, nor any other person acting under said Alias Execution make any search, or inquiry for such, or any personal property of this deponent whereon to levy said Alias Execution, but that, on the contrary, said High Sheriff and his subordinates entirely failed and neglected to make any inquiry of this defendant, or any search of the home of this defendant, or any other search whatever, in so far as the knowledge information and belief of this deponent extends, for such, or any personal property whereon to levy as aforesaid, prior to publishing notice of the sale of the real property of this deponent under the said Alias Execution.

(Sgd.) C. B. MAILE.

Sworn to before me this 7th day of July, 1904.

(Sgd.) N. FERNANDEZ,
[NOTARIAL SEAL.] *Notary Public, District of Honolulu, Island of Oahu.*

Service of the herein Motion is hereby admitted, and copy of same received.

Dated this 8th day of July, 1904.

(Sgd.) FRANK ANDRADE,
Attorney for Plaintiff.

(Sgd.) H. VAN GIESON.

Endorsed: District Court of Honolulu. James W. Pratt, Collector of Taxes, *vs.* C. B. Maile. Motion to Set Aside Sale and Affidavits. C. W. Ashford, Attorney for Defendant.

87 In the District Court of Honolulu, Island of Oahu.

JAMES W. PRATT, Collector of Taxes, Plaintiff,
vs.
C. B. MAILE, Defendant.

Plea of H. Van Gieson.

Now comes H. van Gieson, appearing specially herein and not admitting the jurisdiction of Hon. Alex. Lindsay, Jr., District Magistrate of Honolulu, Island of Oahu, over the subject matter of defendant's motion to vacate and set aside sale, and says that the Hon. Alex. Lindsay, Jr. District Magistrate of Honolulu, Island of Oahu, has no jurisdiction over the subject matter herein, to wit, defendant's motion to vacate and set aside sale of property under execution herein.

Wherefore he prays that said motion may be dismissed with costs.
Dated July 20, 1904.

H. VAN GIESON,
(Sgd.) By His Attorneys, ROBERTSON & WILDER.

Endorsed: District Court Honolulu Oahu. James W. Pratt, Col. *v.* C. B. Maile. Plea of H. van Gieson. Robertson & Wilder, Att'ys for H. van Gieson.

88 HONOLULU, T. H., *November, 9th,* 1906.

Received from Henry Van Gieson Six Hundred Fifty-two & 65/100 Dollars, in full payment of Promissory Note dated July 5th, 1904, executed by said H. Van Gieson to May K. Brown including interest at the rate of eight per cent. per annum. $652.65.

(Sgd.) A. M. BROWN,
Att'y in Fact for M. K. Brown.

Endorsed: E. No. 1423. Plaintiff's Exhibit "D." Filed January 3rd, 1907. Job Batchelor, Clerk.

89 *Salmon License.*

1095.
50¢ stamp.

Know all men, that in conformity with the provisions of Act 64, of the Session Laws of 1896, entitled an Act "To Amend, Add to and Consolidate the Laws relating to certain Licenses," etc., approved June 12, 1896, C. B. Maile is hereby licensed upon the terms and conditions as set forth in said Act, and in accordance with the requirements of, and subject to, the Statute Laws of the Territory of Hawaii, to Sell Salmon at Stall 31 Oahu Market District of Honolulu Island of Oahu for the term of One Year from Jul- 2 1904.

This License is not Transferable.

Given under my hand, and the Seal of the Treasurer's Office at Honolulu, this 2 day of July 1904.

Amount Paid $10.

[SEAL.] (Sgd.) HENRY C. HAPAI,
Registrar of Public Accounts.

Endorsed: E. 1423. Plaintiff's Exhibit "E." Filed January 3rd 1907. Job Batchelor, Clerk.

90 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

C. B. MAILE
vs.
J. W. PRATT.

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91 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

C. B. MAILE
vs.
J. W. PRATT.

Transcript.

DEC. 31, 1906.

Direct examination of A. M. BROWN, called and sworn.

Mr. ASHFORD:

Q. Mr. Brown, on the fifth day of July, 1904, what was your official position?

A. I was high sheriff of the Territory of Hawaii.

Q. Do you remember having on that date held what purported to be an execution sale at the front door of Kalakaua Hale in this city of certain real estate theretofore belonging to C. B. Maile?

A. There was a sale made. I am not positive as to the date; I guess that was the date.

Q. Do you remember the fact that I was there present and
92 made a protest against the sale?

A. I do.

Q. Do you remember what were the grounds of that protest?

A. I think the grounds of the protest were that there was a restraining order of some kind issuing out of the district court.

Q. Do you remember any other?

A. I don't recall at this moment whether there were any other grounds for the protest or not.

Q. Do you remember one ground of the protest was that the district court never obtained jurisdiction of the person of Mr. Maile for the purpose of rendering judgment against him?

A. Whether you stated that or not I don't recall.

Q. Do you remember that I made or offered one or more bids upon one of the parcels, particularly this parcel located on Alakea street?

A. I remember you did make a bid or two on one piece.

Q. Do you remember that you interrupted the crying of the sale at that point and announced that you would require a deposit of fifty per cent. of the sale price upon the fall of the hammer?

A. I did.

Q. Do you remember a further protest by me against that rule as being a rule or condition that was not mentioned in the advertisement of sale?

A. I do.

Q. Did you or did you not withdraw that condition upon that protest?

A. I don't think I did.

Q. Do you remember that all three of the parcels in ques-
93 tion were struck off to H. Van Giesen, trustee?

Mr. LIGHTFOOT: We object. The record is the best evidence. (Objection overruled.)

A. I don't remember whether it was Van Giesen individually or Van Giesen trustee.

Mr. ASHFORD:

Q. But anyway it was Van Giesen, either in his individual capacity or assuming to act as trustee?

A. Yes.

Q. Do you remember whether then and there, upon the fall of the hammer, after you had announced the condition that I have spoken of, he made a deposit of fifty per cent. of the sale price?

A. He came into my office—I don't think I remained outside until the wind-up of the auction sale, and he came into my office shortly after the sale was concluded and said that he had $300 to deposit.

Q. Did he deposit it then and there?

A. He did not.

Q. Isn't it a fact, Mr. Brown, that he didn't have the money but

that you and he went together to some bank in the city and borrowed the money upon your own——

Mr. MAGOON: I object to the question.

Mr. ASHFORD:

Q. Did he have it then and there?
A. He told me he did.
Q. Did you see it then and there?
A. I did not.
Q. Is it not a fact that that same date you and he went together to a bank, where he borrowed the money for the purpose of paying upon that sale?
94 A. He did not. He——

Mr. MAGOON: If he did not I submit that answers the question.
The COURT: I think the witness may make any explanation.

A. He did not borrow any money jointly on a note with me.

Mr. ASHFORD:

Q. Did he borrow any money in your presence at any bank on that day for the purpose of making payment upon that sale?
A. He did not.
Q. Did you and he go together to any bank that day or any other day before you gave a deed to him, for the purpose of enabling him to raise the money for that purpose?
A. We did not go to any bank together.
Q. Did you not go to a bank on his behalf and negotiate a loan for him for the purpose of making payment upon that sale?
A. I did.
Q. That same day?
A. I think it was that afternoon. It was not a loan from the bank.
Q. Well, it was a loan from some individual then?
A. It was a loan from an individual.
Q. The fifth of July was Saturday, was it not, that day that you held the sale, or do you remember?
A. I think it was.
Q. Well, would you understake to say then that if the sale took place at 12 o'clock and following 12 o'clock that you arranged the loan that same day or later?
A. About 3 o'clock that Saturday afternoon.
Q. Is it not a fact that in order for him to borrow that money for that purpose you endorsed or otherwise signed the note which
95 he gave for the loan?
A. I did not.
Q. You didn't become a party to the note in any way?
A. I did not.
Q. Did you become a party to the loan in any way?
A. I did not.
Q. What was the amount, if you remember, that was borrowed; was the amount coincident with the amount——

A. I think it was $550.

Q. And that $550 was the aggregate of his bids upon that property, was it not?

A. It was a little over.

Q. Will you state the person from whom it was borrowed?

A. It was Ned Damon of Bishop's Bank.

Q. When did he obtain the money,—that same day?

A. That same afternoon.

Q. When did he pay it to you, or any portion of it?

A. I don't remember whether he turned it over to me that afternoon or kept it and turned it in to Mossman in the deputy sheriff's office.

Q. Was it paid into your office that day at all or sometime later?

A. It was—as far as my recollection goes it was either paid to me that afternoon or paid to Mossman.

Q. Was it customary with you at that time to keep a record of the names of those who were present at those sales, or some of them?

A. Yes, it was the custom of the clerk in the deputy sheriff's office, Harry Mossman, to keep such a record.

Q. Isn't there such a record in that office at present, that is, of that particular sale?

96 A. I doubt if there is today. Mossman's method of keeping records was very loose. That was supposed to be the custom, and I know in some instances he recorded on the back of the execution the names of some of those present, whether it was done in this case I wouldn't—I couldn't state it.

Q. Was it not customary for Van Giesen about that time to attend those sales and keep such record?

A. No.

Mr. MAGOON: I object. It doesn't make any difference.

The COURT: He has answered.

Mr. ASHFORD:

Q. Mr. Brown, Van Giesen, the defendant in this suit, was at that time, was he not a police officer upon the force of the Honolulu police here?

A. He held a commission as a special police. His special duty was stenographer and typewriter.

Q. And employed in your office?

A. He was.

Q. Do you know anything of an effort on the part of the present plaintiff, Mr. Maile, to settle the matter with Van Giesen later and obtain from him a deed of the property?

Mr. MAGOON: We object to that as being entirely immaterial. (Objection overruled).

Mr. ASHFORD:

Q. Do you know anything of such proceeding?

A. What was the last question?

(Question read.)

Q. That is prior to the beginning of this suit.
A. Prior to the filing of this suit?

The COURT: The suit was filed August 23rd, 1904.

A. I know of no effort on the part of the plaintiff to com-
97 promise this matter or settle it with Van Giesen prior to that date.

Mr. ASHFORD:

Q. Well, do you know of any such efforts, and then fix the date as nearly as you can?

Mr. MAGOON: I object to that.
(Objection overruled.)

The COURT: At any time then, Mr. Brown?
A. Well—
Q. That is, of your own knowledge.
A. I simply know of a conversation that I had with Mr. Colburn concerning the matter, made about two months ago.

Mr. ASHFORD:

Q. Was that the first that you had——
A. Personally I don't remember knowing it; I don't remember having anything direct with Mr. Maile; I doubt if I had any conversation with him about the matter at all.
Q. And in this conversation that you had with Mr. Colburn was he purporting to act for Mr. Maile?
A. I understood that he was.

Cross-examination of A. M. BROWN.

Mr. MAGOON:

Q. After the issue of the first execution, in the postponements of the sales will you state at whose request those postponements were made?

Mr. ASHFORD. I object. That is not cross examination,
98 neither is it material.
(Argument.)
Mr. ASHFORD: This reminds me of a few questions I would like to ask.
(Mr. Magoon withdraws his question.)

Mr. ASHFORD:

Q. Mr. Brown, in what way did you levy the alias execution under which that sale was held upon the property in question?

Mr. MAGOON: I object to that.

Mr. ASHFORD:

Q. What was your manner of making the levy?

(Objection overruled.)

Mr. ASHFORD:

Q. In what manner then, Mr. Brown, did you levy, if you did levy upon the execution in question, upon this land?

A. Well, it was levied upon in the form usually followed in that office,—by an officer going around to the property to be—that was advertised, posting up a notice on that property that it was levied upon and offered—or would be offered for sale on a certain date by virtue of such a judgment, and then by publishing that notice in a newspaper according to the legal requirement, I think it was three times during the period of thirty days.

Q. Well, confining your attention now, if you please, to these preliminary acts,—an officer going upon, etc., what officer went upon the land; did you?

A. I did not.

Q. Do you know as a matter of fact that any officer did?

99 Do you know any officer who did?

A. I don't recall who the officer was.

Q. Do you know as a matter of fact that any officer did?

A. Well, I can't recall at this time whether I know of my own personal knowledge that any officer did.

Q. Do you know that any notice whatsoever was posted by any officer upon any of these pieces of land, setting forth a levy?

A. No, I wouldn't undertake to state of my own personal knowledge that I saw those notices. I simply speak from the custom of the office in levying upon real estate.

Q. Do you keep a record in your office of just what steps have been taken upon these various executions that are placed in your hands?

A. No, nothing more than the continuances of the sale. If the date set—if a sale is continued, why that fact is noted on the execution. Outside of that fact I doubt if there is any record kept.

Q. Therefore there would be no such record in your office, even though any particular officer did go upon the premises in question or any of the premises in question and post up any notice?

A. No, there would be no record.

Q. In an affidavit which is signed by you, filed in this cause, you have stated that Maile at one stage advised you that he had money in Mr. Colburn's hands with which to pay this debt, is that true?

Mr. MAGOON: It is entirely immaterial.

Mr. ASHFORD: The affidavit was made after the suit was brought but it referred to what he knew before.

The COURT: That may be asked.

100 A. I made an affidavit to that effect; whether it is in those exact words, that he had paid the money to Colburn to pay his taxes I don't recall, but the substance of it is the same.

Q. Gave you to understand that Colburn had the money?

A. Gave me to understand that he had given Colburn the money to pay the taxes.

Q. This was before the sale was it not?

A. Before the sale.
Q. The conversation was before the sale?
A. This conversation was before the sale.

Mr. ASHFORD:

Q. It was also before the issuance of this alleged execution, was it not?
A. Before the issuance of what?
Q. Of this latest execution, this latest execution now in question?
A. Well, I don't recollect at this date. At the time I made the affidavit the matter was so much fresher in my mind than they are today. I remember that conversation and it was either prior to the date of sale of the second execution or the third execution, one or the other.
Q. There was a second execution then, was there?
A. What's that?
Q. There was a second execution, was there, an intermediary execution after the return of the first execution *nulla bona* and before the issuance of this last execution? You have so stated in your affidavit.
A. Well, if I have stated in my affidavit that there were three executions that is probably correct. The matter was much more vivid in my mind then than it is today and I have not refreshed my memory.

101

Q. I will refresh your memory from the contents of your affidavit, namely, that there was a second execution issued and that you levied upon this same real estate, and that Maile then came to your office and told you that Mr. Colburn had been paid by him the money, or had the money in hand, with which to pay that, had Maile's money in hand to pay that, and that thereupon you withdrew that execution. Now with those suggestions as to the contents of your affidavit can you state what are the facts?

(Copy of affidavit shown to witness.)

Now then referring to "said second execution," right along there. (Showing.)
A. What is the question, Mr. Ashford?
(Question read.)
A. There were three executions altogether. There was a second execution.
Q. What became of it.
A. The second execution, it was returned to court unsatisfied upon the request made by me, if I remember rightly, or Andrade, Frank Andrade, attorney for Pratt, that Colburn was to pay the—would pay the taxes for Maile.
Q. So that the levy that you made under the second execution, if you made any, was released?
A. Yes.
Q. By authority of the attorney for the plaintiff in that suit, namely Pratt?
A. Yes.

The COURT: At any rate there were no proceedings ever had under that execution, no sale?

A. No; there was—there was the levy and the advertis-
102 ing—and the advertisement, but at the last moment the sale was withdrawn upon advice of counsel for the plaintiff.

Mr. ASHFORD:

Q. And the return made likewise upon his advice?

A. Yes; I wouldn't be positive as to the return on that execution, whether it was—I know the execution was returned and the property was not sold under that execution but the property was released under that execution; just what the return on the back of that execution is I wouldn't undertake to state.

Q. The point I wish to bring out, however, is that the levy never was made; was released?

A. It was.

Cross-examination resumed.

Mr. MAGOON:

Q. With reference to the taking out of the first execution, can you recall when it was that you saw Mr. Maile, C. B. Maile?

A. As far as that first execution was concerned and the doings under that first execution, I don't believe I had anything to do with him. The first execution was an execution issued against Maile's personal property and that execution was returned unsatisfied as no personal property could be found, and I doubt if I had anything to do or say with Maile as far as that first execution is concerned. That is my recollection at this time.

Q. Yes, now with reference to the taking out of the second
103 execution?

A. The second execution was issued by the district magistrate against the personal and real property of C. B. Maile and that is the execution which I have just stated was returned to court upon the advice of the attorney for the plaintiff that Colburn would pay the taxes.

Q. Did you see Mr. Maile subsequent to the taking out of that execution and before taking out of the third execution?

A. I did.

Q. What was the entire conversation, as far as you can remember, with Mr. Maile about the matter?

A. Well, that conversation was to the effect that the taxes had to be paid; expenses were counting up and that a third levy and advertisement would still further add to the costs, and I wanted him if possible to settle the matter and avoid further expense. Then it was that he expressed surprise that the taxes had not been paid; that Mr. Colburn had been furnished with the money to pay the taxes and that he, Maile, supposed they had been paid.

Q. Well, what was the ending of the conversation, that is, was there any understanding reached as to what would be done in the matter?

Mr. ASHFORD: I object. I submit it is immaterial and it is not cross examination.

The COURT: I suppose the court might be better able to determine what the understanding was if it knew what the facts were.

A. Well, you mean the understanding on the part of Maile and myself?

Mr. MAGOON: Yes, any agreement or arrangement reached between you.

104 A. Well, the understanding, as I remember it, Maile left the office that day stating that he wanted the taxes settled and proposed to see that they were settled.

Q. Now after that did you take any steps in the matter, or see Mr. Colburn, before you advertised the property for sale?

(Argument.)

Q. Do I understand that after the property was advertised Mr. Maile came to you and said that the money was in Mr. Colburn's hands?

A. No, prior to the third levy. Prior to the third levy I sent for Mr. Maile and had the talk with him.

Q. Oh, you sent for Mr. Maile?

A. Yes.

Q. Did you apprize Mr. Maile of the nature of the request for him to come and see you?

Mr. ASHFORD: Once again, this is not cross examination I submit.

The COURT: I will permit the question.

Mr. ASHFORD: I would like it to be confined to a point before the issuance of the third execution.

The COURT: Let's see what Mr. Brown has to say about it.

A. This conversation with Mr. Maile was prior—I don't know whether it was prior to the issuance of the third execution, it was prior to any levy or action under the third execution.

Mr. MAGOON:

Q. Now you say that you sent for Mr. Maile?

A. I did.

Q. Did you say anything to him when he came as to the purpose of your sending for him?

A. Certainly.

Q. What was that?

105 A. That I wanted to see him about these taxes as to have the matter settled without further expense to him.

Q. And what was his reply?

A. His reply, as I have stated was an expression of surprise that the taxes had not been settled, as the money had been placed in Mr. —— that he had turned the matter over to Colburn to settle it.

Q. Was there anything else?

A. No.

Q. And that's all that you can remember of the conversation that you have detailed here?

A. That's all.

Q. Now subsequent to that time did you see Mr. Colburn about the matter?

A. I don't remember seeing Mr. Colburn prior to the levy. After the third levy was made, the property advertised and the day of sale under that third levy and execution arrived, I do remember that Mr. Colburn was present at the station house at the day and hour of the sale and requested a week's continuance, which was granted.

Q. Did you have any conversation with him other than this request for a continuance that you can remember of?

A. Well, there was none—No, I don't remember the conversation. I remember Mr. Colburn being there, the request for a continuance, and the understanding that at the end of that week's continuance the thing would be settled for good and for all.

Q. Settled by sale or by payment?

A. Settled by payment.

Q. Did you suggest to Mr. Colburn anything that Mr. Maile had said to you with reference to his having funds to pay the amount of the execution; do you remember that or anything of that
106 nature?

A. I don't recall at this time talking to Mr. Colburn about that matter. I undoubtedly did, but just what the conversation was or just what I said and he said I can't recollect.

Q. Now the sale was postponed at the request of Mr. Colburn, acting for Mr. Maile, for one week. What took place when the time came again for sale, or any time prior to that?

A. Well, in the interval between the, I think it was—I see by my affidavit it was the 27th of June; that was the day that Mr. Colburn requested a continuance; then between that date and the fifth of July, I think it was, the property was sold, there was a restraining order issued from the district magistrate concerning this sale, and upon the advice of counsel I proceeded with the sale.

Q. Now prior to the sale did you have any talk with Mr. Colburn or with Mr. Ashford, representing Mr. Colburn, Mr. Colburn or Mr. Maile?

A. Well, Mr. Ashford was there at the office. I remember his making protest concerning the sale, whether we had any other conversation concerning the sale I don't recall.

Q. Now you say, that is after the injunction or the—I don't want to dignify it by calling it an injunction or restraining order, but after this document which was issued by the district magistrate, which you received, was served on you with reference to enjoining the sale, did you have any communication with Mr. Maile or send any word to him?

A. If I remember rightly I sent word to him the morning of the sale.

Q. That's it.

Mr. ASHFORD: We will admit, if you wish to show it, that Mr. Maile did receive word the morning of the fifth of July that
107 it was the intention of the sheriff to proceed with the sale.

A. That notice was sent to him.

Mr. ASHFORD: We admit that; and it was in consequence of that notice to Maile that I went through the steps and made a protest.

Mr. MAGOON:

Q. Now with reference to exacting cash, that is one-half cash as you have stated, in the bid, what was the occasion of that statement by you?

A. Well, I wanted to be sure that the bids that were made at that sale were *bona fide*, and that if a bid was made the money would be paid, and when Mr. Ashford started to bid I inferred that he was bidding in the name of Maile, and I doubted very much whether any cash would be paid at all if Mr. Ashford bid the property in unless I exacted some such conditon as that.

Q. With reference to the accepting of bids in execution sales where no cash is paid, what is the result and has been the result?

Mr. ASHFORD: I object; not cross examination, incompetent, irrelevant and immaterial.

The COURT: Objection sustained.

Mr. MAGOON:

Q. Just what did you say, Mr. Brown, with reference to exacting cash, do you remember? Of one-half cash, I would say, at the bid?

A. Well, if I remember rightly I spoke to the auctioner at the time, I think it was Mr. Morgan; said, "Mr. Morgan, will you please announce to all bidders present that a deposit of 50 per cent.
108 of the price of the bid will be required to be deposited at the drop of the hammer."

Q. Did anyone present protest that they would not bid because of that statement of yours?

A. Mr. Ashford, after I requested the auctioneer to announce that fact, did make some kind of a protest. He was the only one.

Q. Well, did he protest that he would not bid because he was not prepared to pay one-half cash at the drop of the hammer?

A. No, he didn't protest on that ground. He asked me—I think he turned around and asked me if I was not attempting to discriminate against him, or some such words to that effect. I replied that I was not; I simply wanted to be sure that I would realize the amount of the bid.

Q. Was Mr. Colburn present at that sale?

A. I don't, think so.

Q. Mr. Brown, did you have any interest, directly or indirectly, in Mr. Van Gieson's bid?

Mr. ASHFORD: One moment, I object. It is not cross examination and it is not material. There is no such interest alleged.

The COURT: Well then, I suppose there is no occasion for putting the question, if they don't claim or——

Mr. MAGOON: No. That's all.

109 Direct examination of JAS. L. HOLT, called and sworn.

Mr. ASHFORD:

Q. Mr. Holt, what is your official position?
A. Tax Assessor of the First Taxation Division of this island.
Q. How long have you held that position?
A. Since March first, 1904.
Q. Who was your predecessor in that office?
A. James W. Pratt.
Q. When did Mr. Pratt leave that office?
A. When I was appointed.
Q. That is on the——
A. First of March.
Q. First day of March 1904?
A. Yes sir.
Q. Has he at any time since the first day of March 1904 been tax assessor for the first division?
A. No sir.
Q. More particularly on the 18th day of May—on the 25th day of May 1904 and thence to and including the fifth day of July 1904 state whether or not Mr. James W. Pratt was tax assessor and collector for the first division of this Territory?
A. No sir, he was not.

110 Q. Are you familiar with the parcels of land that were assessed to C. B. Maile within Honolulu during the years 1898 to and including 1903? I will tell you their location,—first, premises on the makai side of Pauahi street, portion of Royal Patent 226, Land Commission Award 783; second, those premises on Alakea street, the Ewa side of Alakea street between King and Merchant and immediately adjoining on the mauka side the brick building occupied by Mr. Magoon and known as the Magoon building; third, those premises at Kawaiiki and Keoniula, Honolulu, near the Asylum gate, on the new extension of School street, described in Royal Patent 2460. Are you acquainted with those premises?
A. I am.
Q. I will ask you, have you the record to show at what rates those premises were assessed in the year 1898?
A. My subpœna only called for 1900.
Q. I beg pardon?
A. My subpœna only summoned me to bring—being for 1900.
Q. Oh, for 1900.
A. No '98 here.
Q. I will begin with 1900, if you haven't the 1898 record before you.
A. Well, we are having some of our books rebound and they are probably down at the printer's.
Q. You haven't got it with you?
A. No, I have 1900.
Q. Start at 1900, then, please.

Mr. MAGOON: We object, as a matter for the record, to any testimony of value being given, for two reasons, the first is that in tax

sales no inadequacy of consideration can be shown to set aside a sale, and the second reason, that where the owner of the property being sold attends the sale and makes any statement which
111 would have a tendency to deter bidders, he is estopped to show inadequacy of consideration.

The COURT: Let it be understood that it is objected to and I will consider it or not consider it as I later determine upon argument.

Mr. ASHFORD:

Q. Now for the year 1900, will you give me the Pauahi street lot first.

A. I have just discovered that I haven't got the year 1900; I have just sent for it. I have got the year 1901.

Q. For 1901 then, Pauahi street.

A. 1901, filed, page 122, Margin 2424, in the name of C. B. Maile, assessed for land Asylum Road.

Q. We will take Pauahi street; that is our first parcel named.

A. $1500.

Q. That is parcel No. 1 on Pauahi street.

A. Land Alakea street $10,000.

Q. 10,000. That is the second parcel named in the bill.

A. Land Asylum Road 5,000

Q. 5,000. Now have you——

A. And land——

Q. I don't care for any others, if he has any.

A. Keoniula, you wanted Keoniula?

Q. O yes.

A. There is also another piece here Kawaiiki

Q. Kawaiiki and Keoniula.

A. There is a separate piece marked "Taro land, Kawaiiki" for 500

Q. Royal Patent 2460, have you the patent there?

A. No sir. The Kawaiiki piece is assessed for 500, and the Keoniula at a thousand dollars.

112 Mr. MAGOON: I think we ought to limit it to the land described in the bill.

The COURT: I think so.

Mr. ASHFORD: What is that Asylum Road if that is not—$5,000 you say?

A. $5,000.

Q. Well, is it not a fact, Mr. Holt, that Kawaiiki and Keoniula are one piece on the Asylum Road there, but you have them separately assessed there, have you?

A. Separately assessed. I think the Kawaiiki piece referred to here is the one that is in—adjoins the asylum there or—that is, Kawaiiki piece, because the name of that place is Kawaiiki.

Mr. MAGOON: I object to his testimony on the ground it is indefinite; we ought to have the land more definitely pointed out.

Mr. ASHFORD:

Q. Well, can you state how much that land was assessed for, whether separately or in different lots?
A. Separately assessed, $500.
Q. Separately? I thought you said 500 for one and 1,000 for another?
A. No, the Keoniula piece, you asked about that too; that is assessed for a thousand dollars.
Q. Well, do they not adjoin?

Mr. MAGOON: Of his own personal knowledge?

Mr. ASHFORD:

Q. Is it not a fact that Kawaiiki is a name inside of Keoniula and that this description which I read embraced them both?
A. Being two separate pieces altogether, Mr. Ashford, I
113 think.

(Argument.)

Mr. ASHFORD: I will undertake to prove later on that they were all in one deed and all conveyed.
The COURT: Might have Mr. Holt give the value of the other piece with the understanding that it will be eliminated if it does not appear to be the land mentioned in the——
Mr. MAGOON: That is satisfactory.

Mr. ASHFORD:

Q. As I understand you the Kawaiiki is assessed for 500 and Keoniula for one thousand?
A. One thousand.
Q. And the aggregate $1500?
A. 1500.
Q. Now will you go back to 1900, if you have the book here.
A. Yes, sir.

Mr. MAGOON: Can I cross examine on these different items? That will save a lot of going over the books, I submit.

Q. You were not assessor in 1901, were you, Mr. Holt?
A. No sir.
Q. And you don't know anything yourself of the valuations placed upon those properties in that year?
A. No, sir.
Q. You are simply reading from the record?
A. Yes, sir.
Q. And you don't know anything as to the valuation, as to whether or not returns were made by Mr. Maile of those properties, of your own knowledge?
A. I know from the records.
Q. Well, can you say from the record whether or not in
114 1901 there was a return made by Mr. Maile?
A. No, sir, there was none.

Q. Now can you state what the property assessed at $10,000 there consisted of?
A. Consisted of house and lot on Alakea street.
Q. Does it give the size of the lot?
A. It does not.
Q. Or the specific location of the lot, other than Alakea street?
A. No sir.
Q. Can you tell from that assessment book where that lot was?
A. Well, from my own knowledge?
Q. No, from the book, I say.
A. No sir.
Q. Now as to the other piece of property, where was that,—the Pauahi street?
A. Pauahi street.
Q. Does that give the royal patent on Pauahai street?
A. It does not.
Q. Can you tell where the property is?
A. Of my own personal knowledge I know where the property is.
Q. No, I mean from the books.
A. No sir.

Mr. ASHFORD:

Q. Mr. Holt, now referring to the 1900 book, if you have it.
A. In the year 1900, Book 5, page 109, margin 2167. Assessment against C. B. Maile, year 1900, land Alakea St. $6,000, land Pauahi street $1500, land in Keoniula one thousand dollars.

115 Mr. MAGOON:

Q. You were not the tax assessor in 1900?
A. I was not.
Q. And you knew nothing of the valuations placed those properties by the tax assessor at that time?
A. No sir.
Q. You are simply limiting your testimony to the books?
A. Yes sir.
Q. Do the books show where these properties were definitely located, the boundaries or the royal patents?
A. No, this book doesn't show where the different lands——
Q. Were any returns made by Mr. Maile for that year?
A. No sir.

Mr. MAGOON: That's all.

Mr. ASHFORD:

Q. Now 1902, if you please.
A. The year 1902, Book 5, page 172, appears the name of C. B. Maile, land Alakea street 2,000.
Q. 2,000?
A. The assessment 6,000; improvements—2,000 appears in the area column. It does not say square feet or acres or anything. $6,000 for the land and $1500 for the improvements; total assessment in the sum of 7500. Pauahi street lot, gives an area of 2380

feet, assessment 4760 dollars, land Kawaiiki 500, Keoniula one thousand.

Q. Mr. Holt, in your capacity as assessor, since you were appointed, have you become familiar with those properties?

A. Yes sir.

Q. How long have you been concerned with the assessment of taxes in this city?

116 A. Since 1896.

Q. Have you had experience in the valuing of the different properties, real estate in different parts of the city during that time?

A. Since 1901.

Q. Do you consider yourself competent to place values upon the real estate of this city?

A. I do.

Q. Are you familiar——

Mr. MAGOON: I move to have it stricken out, whether a man considers himself competent or not.

(Stricken out.)

Mr. ASHFORD:

Q. Well, you say since 1901, you have had such experience. What has it been?

A. 1901 I was appointed deputy assessor and had considerable to do in valuing various property wherever I was sent to assess it.

Q. And as a matter of fact did assessing and valuing of real estate values in this city?

A. Yes sir.

Q. In that year?

A. Yes sir.

Q. And what about 1902?

A. The same.

Q. And 1903?

A. 1903.

Q. Now in 1904, March first, you were appointed as the assessor?

A. Yes sir.

Q. And from that date to the present who has done the assessing in the final instance here in this city?

A. Myself and the deputies under me.

117 Q. But your estimate or your judgment has been the final one in the office?

A. Whenever matters of importance are called to—my attention was called to it for land valuations, where returns were made, I would personally go over them myself and memorandums furnished by the deputies.

Q. Are you familiar with this piece of land up Alakea street that you have been speaking of and which lies between the new building being erected by Mr. McCandless on the mauka side and the building of Mr. Magoon on the makai side, and extending back from the Ewa line of Alakea street to the premises of Lewers & Cooke?

A. I am.

Q. What in your judgment was the value of that property, land and improvements, on the 5th day of July, 1904?

Mr. LIGHTFOOT: We object. Understand all this testimony is subject to the same ruling?

The COURT: I understand. Very well.

Mr. ASHFORD:

Q. Answer the question, Mr. Holt.

A. $7500.

Q. Are you familiar with the piece of land on Pauahi street which is referred to in those books that you have read from?

A. I am.

Q. What in your judgment was its value on the 5th day of July, 1904?

A. About 3,000.

Q. You have told us in 1903 it was assessed at 4700; do you think it was worth as much as that?

A. I didn't make the assessment.

Q. Do you happen to know at what rate it has been as-
118 sessed since you became assessor?

A. About a dollar and a half a square foot; that is for——

Q. How many square feet,—2300, 2380 square feet?

A. 2380.

Q. Do you consider it worth that much?

A. Not right through. I mean taking the frontage, about a depth of fifty feet, it is worth that in the year you are speaking of, 1904.

Q. Well, one-half of that would be 3440; do you consider it worth as much as that July 5th, 1904?

A. I think so.

Q. Are you familiar with the lands on the Asylum Road there of Kawaiiki and Keoniula?

A. I am.

Q. What do you consider the land of Kawaiiki was worth July 5th, 1904?

A. I couldn't say; the area not in here, it is pretty hard for me to judge what the——

Q. Well, have you assessed it?

A. In 1903?

Q. In any year?

A. No sir.

Q. Well, have you any way of knowing whether it was worth as much or approximately as much as it is assessed for upon your books?

Mr. MAGOON: I object to that question as being too indefinite. In the first place it is leading.

Mr. ASHFORD:

Q. Do you remember of having been up to look at the land in question in company with Mr. Maile and Mr. Colburn?

A. I believe I do.

119 Q. Well, was the land pointed out to you?

A. It was.

Q. And you are otherwise familiar with it from your connection with the tax office, are you not?

A. I know where the piece of land is, but what is its value in 1904, I couldn't tell whether it is worth what it is assessed on the books until I got the area. You ask me what my approximate value would be of the premises.

Q. Well, when you went to look at the land you went for the purpose of placing a valuation on it, did you not?

A. Not exactly, as to find out where the different pieces of land was located.

Q. Well, did you as a matter of fact make an estimate of its valuation at that time or any other time?

A. I don't remember whether I did; I don't remember whether I did or not.

Q. Do you know at what rate it has been assessed by you since that date, since 1904?

Mr. MAGOON: I object to anything subsequent to 1904.

The COURT: It may not have much weight, but I think it tends in that direction, therefore the question may be asked.

Mr. ASHFORD:

Q. Can you state from that what its value is today, the combined value of Kawaiiki and Keoniula?

A. As of today?

Q. Yes.

A. Less than a thousand dollars.

Q. How much less?

A. Between eight and nine hundred dollars.

Q. Now can you state whether that value is more or less than it was on July 5th 1904?

120 A. Considerably less.

Q. That is, considerably less than that now?

A. Now.

Q. About how much less is it worth now than it was July 5th 1904?

A. Six or seven hundred dollars.

Q. Why is that?

A. Because the demand for property in that neighborhood has—there is no demand for property; property has gone down by other sales in the neighborhood, away down to a mere nothing.

Q. Do you know whether any portion of it has been taken for street purposes in the meantime?

A. I am not so sure.

Q. Now will you please give your estimate of what it was worth then in dollars on July 5th 1904?

The COURT: Well, hasn't he already stated that it would be six or seven hundred dollars less now?

Mr. ASHFORD: Very well; I am done with this witness.

(Here the court adjourns until afternoon.)

Afternoon Session, Dec. 31, 1906.

JAS. L. HOLT, recalled.

Mr. ASHFORD: I find I haven't finished 1903. Have you the books of 1903?

A. I have.

Q. Will you give us the figures of that, please?

A. For the year 1903, assessments on page 105, in the
121 margin 2096, land Alakea street $6,000, improvements 1500; land Pauahi street——

Q. Excuse me just a moment. Are we to understand that that is $7500 altogether?

A. $7500 altogether.

Q. And was it the same in 1902?

A. Yes sir. Land Pauahi street $4760, land Kawaiiki $500, land Keoniula thousand dollars.

Q. I would ask you, if you please, to go back to 1900 and give us the figures on the land on Alakea street. I think I may have made a mistake there.

A. 1900, Alakea street was assessed $6,000.

Q. And how much for the improvements?

A. Well, that is inclusive.

Q. Oh.

A. Pauahi street 1500, Kawaiiki 500, Keoniula a thousand.

Q. Yes. Mr. Holt, is it not a fact that the name Keoniula refers to a large tract of land lying between Liliha street on the one side, King street on the makai side, Judd street or thereabouts on the mauka side, and the land of Kapalama on the Ewa side; in other words all that big tract there is Keoniula, including Kawaiiki and Kunawai and many other lands?

A. I think it does.

Q. Are you aware of any real division into two lots of this land at Kawaiiki?

A. My understanding is that the piece at Kawaiiki is some taro lands away up at the gate of the Asylum Road, and this Keoniula piece is a piece near Kuniakea's, away down near King street.

Q. Kuniakea's, that is at Palama, isn't it?

122 A. Yes, Keoniula is the general name.

Q. Mr. Holt, are you aware that prior to July 5th 1904 the extension of School street was arranged for, if not actually made, whereby a small corner of this land at Kawaiiki was taken for the road and a frontage given to the balance on School street?

A. I so understand now that is.

Q. Prior to that it had no frontage, had it, on any road?

A. No sir.

Q. Had to be reached only by travelling over the kuaunas of other taro patches?

A. Yes.

Q. And it now has a frontage?

A. Yes sir.

Cross-examination.

Mr. MAGOON:

Q. You had nothing to do with the assessment in 1903, did you, Mr. Holt?
A. Not directly; indirectly.
Q. That is, you didn't fix the valuations in any way?
A. No.
Q. And you would take the valuations that have been testified to by you from the books, do you not?
A. Yes.
Q. Was any return made in 1903 by Mr. Maile, or anyone in his behalf of the taxes?
A. No sir.

123 Q. And is there any reference in the assessment book to any particular pieces of land by metes and bounds or by royal patent?

A. The year 1903 there is a patent issued.
Q. I wish you would please tell us what it was.
A. It was patent of the land on Pauahi street between R. P. 226, L. C. A. 783.
Q. Does it give you the area?
A. Gives the area of 2241 square feet.
Q. Is any other royal patent mentioned?
A. The next one is the Keoniula.
Q. What is the royal patent mentioned there?
A. 2460.
Q. What is the area given there?
A. 1.02 acres.
Q. Any other royal patent given?
A. No sir.
Q. Now do I understand, Mr. Holt, that you testify to values of real estate based upon valuations as a purchaser or dealer in real estate?
A. No, I do not.
Q. You would not want to say, would you, or give an opinion as to how much these different pieces would bring if they were put up at auction?
A. No, I am not prepared to state.
Q. Then I understand that for taxation purposes the valuations which you have placed on the Alakea street property at—what did you say,—7500?
A. 7500.
Q. Is simply for taxation purposes?
A. For taxation purposes, in conjunction with the value of the surrounding property.

124 Q. And you arrive at your basis of valuation, do you not, by a sort of general average of property, not what any particular piece would sell for but basing it upon a general average of the value of real estate in that location?

A. I do.
Q. And would you want to give any, or place any valuation upon

the real estate, this land in question, for the purpose of purchase or sale between private individuals?

Mr. ASHFORD: Well, I don't think that is relevant; I don't think it is cross examination.

The COURT: I think it is cross examination.

A. As to what is it worth today or then?

Mr. MAGOON: Well, as to what could be obtained for it today?

A. Yes.

Q. I will say today, making it a time specific.

A. On which lot in particular?

Q. Well, I will speak of the Alakea street property.

A. Yes, I would be prepared to.

Q. What would you say would be the actual cash value to a man who would want to buy that piece of land today, Mr. Holt?

A. Between 6000 and 6500.

Q. 6500. Upon what do you base that valuation?

A. Upon the land being on a wide street, and it is right in the middle of Mr. McCandless' property. It has an available frontage.

Q. Do you know what it is leased for?

A. I do not quite recollect now; I think it was $15 a month.

Q. Well, do you think that any living sane man would give 6500 for that piece of property on Alakea street that only leased for $15 a month?

125 A. Well, as I say, the value of the property is—to the adjoining owners is what brings it up to what I testified, that it is worth $6500.

Q. Well, but do you think that anybody could get $6500 for it or anything like it?

A. I believe so.

Q. And what makes you think so?

A. For the simple reason that it abuts onto property, adjoining to the other owners; they like to acquire it.

Q. You think that a person having adjoining property might be willing to give that price for it in order to get rid of Mr. Maile or anybody who owned the interest?

A. Not only; simply it is a detriment to property that is being improved to have an old shack hanging on the property, standing there.

Q. That isn't your idea of the way to arrive at the intrinsic value of property, is it, Mr. Holt?

A. Yes.

Q. It is how much somebody will give to get rid of an old shack, is that the idea?

A. I admit that the shack ain't worth anything.

Q. The shack ain't worth anything; it is an eye-sore and a public nuisance, that is the idea, isn't it?

A. Yes.

Q. And you think that a man who owns valuable property like Lewers & Cooke or Mr. McCandless would give a large sum to get rid of an eye-sore like that?

A. Aside from that I believe the property is worth fully $6500, aside from all this.

Q. Now as a business man would you give $6500 for property that is leased for $15?

126 Mr. ASHFORD: He has not testified that he is a business man.

Mr. MAGOON: I will put it as tax assessor of the Territory of Hawaii.

Mr. ASHFORD: I object again. The tax assessor of the Territory of Hawaii has no authority to purchase land.

Mr. MAGOON:

Q. You, being the tax assessor and understanding the value of properties, would be willing to give, personally, would you, in your private capacity, not as tax assessor, $6500 for that property?

Mr. ASHFORD: I object again. It is not necessary for an expert to be willing to give. He may be unable to give; he may be unwilling to buy at any price but still have very good ideas as to values.

The COURT: I think the objection is well taken.

Mr. MAGOON:

Q. Do you think anyone, Mr. Holt, outside of the adjoining owners, would give anything like $6500 for that piece of property?

Mr. ASHFORD: I object again.

The COURT: I think that is proper. There might be special reasons why, etc.

A. I am not prepared to state. For a man that has purchased property of that kind, had some use to make use of it, would get a good interest on his money by putting up a good substantial building, be able to find a purchaser.

Mr. MAGOON:

Q. You have not figured out, have you, how much interest he would get and how much the building would cost?

A. No sir.

Q. Now do I understand you to say that the property is
127 worth less today than it was in 1904?

A. I do.

Q. What do you base that on?

A. Base it on the general depreciation of properties been sold in the past.

Q. Isn't it a fact, from your own observation, that there has been no sale for property for two or three years last past, excepting as some person might want some particular piece of property?

A. There have been no demand for property in the last few years.

Q. Few years, beginning, we will say, about four years ago when the depression began?

A. Yes.

Q. Since that time there has been no demand for property except-

ing in particular instances where a man might want a specific piece of property, isn't that the idea?

A. That's right.

Q. And haven't the people whose property you have taxed stated repeatedly that they would only be too glad to get the amount that you have taxed the property for?

A. In several instances that has been proved, others, why the purchase price has been far in excess of the taxes assessed.

Mr. ASHFORD: Perhaps the opposite counsel will admit at this point, or state at this point, what revenues he, Mr. Magoon, is now deriving from that piece of land, he being in the position of subtenant, I believe, and himself letting it out.

Mr. MAGOON: Yes you will. I have had a subpœna to appear here and I suppose you will ask me that question when I am on the stand; then I will have the chance to answer it.

128 Direct examination of EUGENE AIU, called and sworn.

Mr. ASHFORD:

Q. Mr. Aiu, what is your official position?

A. I am a second clerk of the district court of Honolulu.

Q. As such have you in your custody the records of the district court?

A. I have.

Q. I ask you to hand me now the records and files, the files particularly, in the case of Pratt against Maile.

(Witness hands documents.)

Q. In my subpœna to you, or the court's subpœna to you, you were asked to produce the records and files of a certain application said to have been made before Magistrate Dickey and decided by him on the 30th day of June, 1904, in the matter of the suit of Pratt *versus* Maile. Have you that paper, or those papers, in your possession?

A. Well, you mentioned about the motion——

Q. I beg pardon?

A. You mentioned about the motion in your subpœna but I didn't find it in the records.

Q. You have made search?

A. We made an extended search for it.

Q. And have been unable to find it?

A. No.

Mr. MAGOON: What kind of a motion did you say?

Mr. ASHFORD: This motion that I allege in paragraph 11 here. Well, if the court please, I offer in evidence these files, except a certain document which I find to have been signed by myself

129 which I do not think is evidence in the case, which is a receipt for the original execution and the alias execution for examination and copying. I do not think that is evidence and I do not offer it as evidence, but I offer the balance of the matter.

Mr. MAGOON: State for what purpose, because I want to object to it.

Mr. ASHFORD: For the purpose of proving the allegations of the complaint in regard to the bringing of the suit by Mr. Pratt, the return upon the summons, the contents of the demand, the motion made by the defendant therein before Judge Lindsay on the first of July, 1904, to quash and set aside the service of summons and restrain the execution sale, and the order restraining said sale signed that same day by Judge Lindsay, the first District Magistrate; also to prove a motion similarly filed on the 6th day of July to vacate and set aside the sale of the property under the execution and the order signed by Judge Lindsay as First Magistrate naming a return day for the hearing of that latter motion on the 13th of July, from which date it was again continued, including the affidavigs of myself, Mr. Colburn and Mr. Maile attached to the latter motion; also the plea of H. Van Giesen to the motion last referred to and dated the 20th of July, 1904, also the return of the high sheriff to the alias execution now in controversy, namely, the execution under which the sale was held, the third execution.

Mr. MAGOON: I object to the introduction of this motion and the order.

Mr. ASHFORD: They are matters set forth in paragraphs 11, 12 and 13, concerning which he neither admits nor denies at this time.

130 Mr. MAGOON: The order; then there is another motion to vacate, that would be the second motion,—one is a motion to quash, and a motion to vacate,—affidavit of C. W. Ashford, affidavit of John F. Colburn, affidavit of C. B. Maile, the plea of H. Van Giesen. I do not object to the return of A. M. Brown, and the original summons, I do not object to that. All the other I object to for the reason that it is not proof in this case. It does not tend to prove or disprove any of the issues in this case. It is irrelevant and immaterial. The district magistrate had no jurisdiction of any kind or order in the remotest degree to issue any such order. It did not restrain the sale and could not have restrained the sale, and a motion to vacate and to quash was irregular and improper and without any authority of law or precedent.

The COURT: I think we better let it go in, Mr. Magoon. I think I will be able to eliminate that which is immaterial from my mind and consider that which is material, so it may be received now as evidence with the same understanding.

Mr. ASHFORD:

Q. I will ask you to turn to Judge Dickey's record of June 30th, 1904. Have you that?

A. Yes.

Mr. ASHFORD: This is a record of the judgment or decision of Judge Dickey upon the first motion made to him, alleged in our paragraph 11.

What I am trying to show now is the motion made before Judge Dicley to set aside the judgment, etc., and decided by him on the 30th of June, and we followed that up with another

131 motion before Judge Lindsay wherein the order was granted, staying the execution.

The COURT: Let it go in.

Mr. ASHFORD: This is the entry, on pages 476 and 477 of district court record of Honolulu, Volume numbered 2, June 30th, 1904, entitled James W. Pratt, collector of taxes, plaintiff, *versus* C. B. Maile, defendant, "Frank Andrade for plaintiff, C. W. Ashford for defendant. Defendant presents written motion to quash alias execution and set aside levy, and makes the additional point, orally, that there was no service on defendant in the case. Frank Andrade, sworn." Now giving his evidence. I don't know that that is really part of the record; I do not care to read that.

(Argument.)

The COURT: I want to get everything before me that is evidence; let's have the testimony too.

Mr. ASHFORD: "Am attorney for tax assessor, first division, and as such prosecuted the case of James W. Pratt, collector of taxes, *versus* C. B. Maile; execution sometime in December of last year. Obtained judgment thereon and caused execution to issue out of this court against the property of C. B. Maile, defendant in that suit. There was levy made by the sheriff of the Territory of Hawaii and the property of C. B. Maile was to be sold under that execution, and about six weeks prior to April 9th of this year. On the day of the sale John F. Colburn, who is the agent of C. B. Maile and has been such for six months last past, asked me for a continuance of the sale until the 9th day of April, when C. B. Maile would get his rents and pay his taxes as required in this suit. Mr. Colburn has continuously from that time to this plead for continuances; the last continuance was last week. Mr. Ashford also, the attorney for C. B.
132 Maile, has asked for a continuance of the sale. Defendant asks that this evidence be stricken out as immaterial and irrelevant.

Motion denied. Cross-examination. Colburn represented himself as agent of Maile in presence of Maile's wife. Maile never told me, nor did Colburn in Maile's presence. Mr. Maile has never been to me personally. I think Mr. Pratt left office before this alias execution was issued." Then, "Motion of defendant is denied; Lyle A. Dickey, District Magistrate of Honolulu."

Q. Now Mr. Aiu, have you the record of the action taken by Magistrate Lindsay upon that motion, July sixth? I propose to read from District Court record Volume 10, page 273.

Mr. MAGOON: All under the same objection, your Honor.

Mr. ASHFORD: "James W. Pratt, assessor of taxes, first division—first taxation division, *versus* C. B. Maile. Motion to set aside service of summons and stay the execution. C. W. Ashford, mover, A. A. Wilder, attorney for A. M. Brown, High Sheriff. Continued to July 13th, 1904. Date, July sixth, 1904."

Mr. MAGOON: I think perhaps if your Honor will let it go in under the same objection, we will have the whole business.

The COURT: Very well then.

Mr. ASHFORD: It went over sometime and now I am finally reading the decision: "August 15th, 1904. Page 338. Pratt *versus*

Maile, from July 13th, 1904. Motion overruled and judgment for plaintiff against the defendant given with costs."

133 Direct examination of J. A. MAGOON, called and sworn.

Mr. ASHFORD:

Q. Mr. Magoon, you have been subpœnaed with request to produce in court here any and all contracts, memoranda or options, which may be written and which have been executed by Mr. Van Gieson, the defendant herein, to you, or to you and any other person, or to any other person or persons other than you, concerning the proposed sale or conveyance of or incumbrance upon the property mentioned in this bill of complaint and referred to in the trial here as the Alakea street property. Have you such document with you?

A. I have not.

Q. Has there been any such document executed by Mr. Van Gieson to you?

Mr. LIGHTFOOT: We object, may it please the court, on the ground that whether there has been such a document executed or not is a matter of privileged communication between attorney and client which the counsel cannot go into at this time. This is a contract, as I understand it, between the attorney and client?

Mr. ASHFORD: Yes.

Mr. LIGHTFOOT: And therefore a confidential communication between attorney and client.

The COURT: Not unless it involves the relationship of attorney and client.

The WITNESS: If I might be allowed to answer so as to put
134 the matter at rest, I will say that I have absolutely no transaction with Mr. Van Gieson in any manner, shape or form, nor any contract, outside of the contract and agreement which I had with him with reference to my engagement as attorney in this matter.

Mr. ASHFORD: That is just the contract we are after, and I call the attention of the court to the fact that on the 20th day of August 1904 this court issued a restraining order against Mr. Van Gieson, restraining him from in anywise contracting concerning that property, and that was followed up by a temporary injunction issued the second day of September 1904 to the same effect, and now if Mr. Van Gieson has been contracting with Mr. Magoon to sell or convey that property the question may have a double aspect, first as to the value of the property in question, second as to whether or not Mr. Van Gieson and Mr. Magoon or either of them have been guilty of contempt of court in that order.

(Argument.)

The COURT: If there has been any violation of this order I think that this is a direct matter, separate and distinct from this. If the order has been violated, why of course there is a way to bring that up.

Mr. ASHFORD:

Q. Mr. Magoon, you are the owner or the lessee of the property

where the so-called Magoon Block, or Magoon Building, stands, are you not?

A. I am.

Q. Mr. Magoon, the parcel of land numbered 2 as described in the bill of complaint here and which has been referred to in this trial as the Alakea street lot, immediately adjoins the so-called
135 Magoon Building upon the mauka side, does it not?

A. It does.

Q. You stand in the position of tenant or sub-tenant of that property at the present time, do you not?

Mr. LIGHTFOOT: I object. It is entirely immaterial.

The COURT: To show his familiarity with the premises. I think that that is proper.

Mr. LIGHTFOOT: We will admit that the witness is familiar.

Mr. ASHFORD: I propose to show the actual income of that property at the present time as a basis——

The COURT: Yes, I think that is proper.

Mr. ASHFORD:

Q. And in that capacity you rent out to other parties, sub-let to other parties, do you not?

Mr. LIGHTFOOT: We object on the ground it is utterly immaterial. (Objection overruled.)

Mr. ASHFORD:

Q. Well, Mr. Magoon, do you lease it to other parties, either by written lease or otherwise?

A. I have leased it out to other parties, several different tenants.

Q. What is the monthly income from the premises to you?

(Objection. Objection overruled.)

The WITNESS: Mr. Ashford, I think, omitted to ask me whether I was the assignee of the lease. That hasn't come out in evidence, has it?

Mr. ASHFORD: No, we will get that later on.

A. Well, all right.

Q. But what is the income that you derive from the premises?

A. It is—I can't tell you exactly what the income is now; the income, the rent isn't paid. I have rented the place from
136 time to time, leased it out at times, all of the times leasing it all to one individual; I have not sub-leased different portions of it, but I have rented it out or leased it out to some one person, the entire premises. The rental hasn't been paid; rental—I think the nominal rental is $60 or $65 a month; it has been reduced and reduced and reduced until I think it is about $40 a month now, the nominal rental, and that isn't paid.

Q. How early did you come into the position you now hold with regard to it as assignee of the lease?

Mr. LIGHTFOOT: We object.

Mr. ASHFORD: I want to find out with reference to these times whether it was before or after the sale.

(Objection overruled.)

A. The—I came into possession of it some time before the sale; perhaps—well, I am so bad in memory at remembering dates, it might have been two or three years prior to the sale or it might not have been so long; I never want to confine myself to dates, but it was prior to the sale.

Q. Do you remember at what rate your sub-tenants were paying or had agreed to pay during the year 1904, and particularly the month of July of that year?

(Objection. Overruled.)

A. I do not remember what rent they were paying, I cannot say. When I took the assignment of the lease I think it was—the property was leased to the restaurant keeper there for thirty, something over thirty, dollars a month; it may have been thirty, thirty-five or thirty-seven and a half,—something like that.

Q. And you took an assignment of that lease?

A. I took an assignment of it, yes.

137 Q. And that is the amount for which you were obligated, is it, to the owner?

A. No, the lease—the rental under the lease, of course it is—I would like to have the lease here—I think it is $15 or $17 a month; I think perhaps it is 17. Mr. Maile can tell us.

Q. About $17 a month that Maile has been getting?

A. And he pays the taxes. I got the land under the lease, Mr. Maile paying the taxes, and I think it is $17 a month.

Q. Well, how much did you give for the leasehold interest?

A. I paid $1500.

Q. How long does the lease run?

A. About nine years to run.

Q. How long has it to run now?

A. I don't know, but I think about seven years.

Q. At that rate then, if it has seven years to run now, you bought it within two years, or not more than two years ago, whereas this sale was held two years and a half ago.

A. Well, you are cross examining me. I think it was nine years to run. Mr. Colburn knows how much it has to run now; I think may be seven years or five years.

Q. Mr. Colburn says four years.

A. Well, I will accept. I don't remember; I hadn't kept it in mind at all.

Q. Well, can't you tell approximately what was the income from the premises in and about July 1904, how much per month?

(Objection. Overruled.)

A. I haven't any possible way of remembering now. I couldn't remember.

Q. Have you any books or records to show in your office?

A. I have an accurate record of every dollar I ever re-

138 ceived from the place and expended on account of it.

Q. Well, can you divide it up, if you please, and say?

Take the restaurant keeper there,—there is a restaurant running there, isn't there?

A. There is.

Q. How much is he paying, the restaurant keeper? How much was he paying two years ago?

A. You see, as I said, I have never leased it out in different parcels; I have leased it always to one person, the entire property.

Q. Is it leased to one person now?

A. Always been; yes, leased to one person now.

Q. Who is that person?

A. I don't know his name; he is the restaurant keeper down there, or was.

Q. Well, how much is he paying now?

A. I think he is paying nothing; his business is——

Q. How much is he agreeing to pay?

A. As I said, I—I can't remember that. I think that it is in the neighborhood of $40 a month that he agreed to pay, but the business hasn't been paying and so he has failed to pay.

Q. In the neighborhood of forty?

A. I think it is about $40 a month.

Q. Can you state whether as lately as July 5th 1904 you were getting or were entitled to receive from your sub-tenant as much as fifty dollars per month?

Mr. LIGHTFOOT: We object again. "Were you getting or were you entitled to get?" The form of the question is objectionable in the first place, and in the second place it is utterly immaterial to this suit.

139 The COURT: Objection overruled.

Mr. ASHFORD:

Q. Very well, answer the question.

A. Well, I think in 1904, about the time that this sale—that in all—I think in all probability,—I won't undertake to say positively,—that I was getting about $50 a month.

Q. About fifty?

A. Yes.

Q. Yes, and previously you had been getting more?

A. Previously I—well, previously I had been getting less. I then increased it, and then I had to reduce it.

Q. And you had up as high as sixty or sixty-five dollars?

A. For a very short time up as high as $60 a month.

Q. And about that time getting, you think, $50?

A. Yes.

Q. And how low have you reduced it since then?

A. I say in the neighborhood of forty, but it is merely a nominal rental, if you can't get it why it doesn't make any difference what the rental is.

Q. Do you not deal directly with the barber, Mr. Peichotto, I think his name is?

A. No, I have nothing to do with him at all; nothing to do with the sub-tenants in any way.

Q. Do you know what rate he pays for his barber shop?
A. I do not.

Cross-examination:

Mr. LIGHTFOOT: Do you wish to make any statement?

A. Yes, I think it is cross examination. The buildings
140 on this lot are good for nothing. There may be some good——

Mr. ASHFORD: You accept the rent for fifty dollars a month.

The WITNESS: There may be some good material in them, but they are tumble-down and in a ruinous condition and almost uninhabitable. They are unsightly and I don't believe that you could rent them excepting to this restaurant keeper, and he has been—this restaurant keeper. There is a barber shop there now, Portuguese barber, who is in there temporarily. As soon as Mr. McCandless finishes his building on the corner this barber will vacate, as he informs me. The—then the rental of the place will in all probability be determined by whether or not a tenant can be obtained to continue there. The buildings should be taken down and new buildings put up in their place.

The COURT:

Q. It would be a very desirable location for good buildings there, would it not?

A. It is not a very desirable location; Alakea street hasn't come to be desirable yet, as Mr. Colburn can testify to in the Kapiolani Estate building, put up there and been a white elephant on his hands for years. Alakea street is a most undesirable business property at this time. It is improving in value very fast, has been improving since Alakea street was widened and since Mr. Kerr put up his building there. I think the Kapiolani Estate building will improve it, and the Young Hotel in all probability will improve it, and the postoffice, if it should be located in that—either in Irwin's lot or in the lot back of E. O. Hall's; E. O. Hall's and the Lewers & Cooke building would improve it, but at the present time the property is undesirable from a business point of view. My own property,
141 that is the property immediately makai, was, I thought, a good location, but it proved to be the worst kind of location,—couldn't get any tenants at all there, something like the Kapiolani Estate building, and the—I don't think that it would be probable to get another tenant to occupy this Maile place under its present condition at any rental at all if this Chinese should move out. I am simply letting him stay there, and while he is not able to pay the rent, I am letting him stay there so as to keep the place occupied. That is—I think that is practically all I have to say.

Mr. ASHFORD:

Q. Do you recollect, Mr. Magoon, quite recently having asked Mr. Colburn as Mr. Maile's agent a thousand dollars for your leasehold interest there, that has four years to run?

A. I think I told him I would take a thousand dollars. He came to me and wanted to buy it, and I would have been very glad to sell

it for a thousand dollars to Mr. Colburn. I don't know but what it was a little less; I don't know but what the figure was somewhat less than that, and I told him I would be very glad to sell, and he told me that he would let me know, but that was the last he ever said anything about it.

Q. Isn't it a fact that you refused to part with it unless for a thousand dollars?

A. No, I went to Mr. Colburn's office, and he wanted to know what I would take for it and the lowest I would take, and I told him.

Q. That was before you became attorney for Mr. Van Gieson, wasn't it?

A. Yes, that was. I will take it now, very gladly, if you will pay it.

142 Q. Your remark concerning the barber shop would intimate that the completion of the McCandless building will depreciate the value of that property. Do you intend to be so considered?

A. O no, I think the completion of the McCandless building will improve the value of the property. You can't—that building there should be taken down. There is no—it should not be allowed to remain in that portion of the town. It is in the fire limits and requires the erection of a brick or stone building; you can't put up a wooden building there any more.

Q. When you say the McCandless building you mean the building on the corner of King and Alakea streets?

A. Alakea. That will improve this property; but nothing will improve it very much except a fire; that will improve it a great deal. I don't want any fire, because I am so close.

Q. You have spoken of the——

A. It is not insured. To insure—you couldn't get it insured; it is not worth insuring.

Q. You have spoken of the ruinous condition of the building. Is it not a fact that when you leased you were obliged to keep them in repair?

Mr. LIGHTFOOT: Now I object again. What earthly difference does it make to this case whether that lease calls for keeping the buildings repaired or not?

The COURT: Objection sustained.

Mr. ASHFORD:

Q. You would hardly claim, would you, Mr. Magoon, that $310 for which the property sold was an adequate price?

A. No sir, I do not think it was an adequate price.

143 Q. State, please, whether you would consider it grossly inadequate?

Mr. LIGHTFOOT: Well, may it please the court, I don't object to this question; I don't believe that it is a proper question, calling for the opinion of this witness as to gross inadequacy. That is a matter that can be decided only by the court, and it does not lie in the mouth of this witness to come and testify "I consider that this is or is not grossly inadequate."

Mr. ASHFORD: I will ask the witness to answer the question.

The COURT: Well, it seems to me for the court to determine whether or not the consideration is grossly inadequate I would have to know the value of the property and also what was paid for it.

Mr. ASHFORD:

Q. I will ask you this: You were at the sale, were you not, Mr. Magoon?

A. I was not.

Q. You were not?

A. No sir, I was not.

Q. Do you mean to say, Mr. Magoon——

Mr. LIGHTFOOT: I object to counsel arguing with his own witness and trying to cross examine.

The COURT: I will permit the question.

Mr. ASHFORD:

Q. Do you mean to say Mr. Magoon that you were not present at the front door of Kalakaua Hale at the time that that property was sold under that execution?

A. Absolutely and positively.

Q. Did you and I not talk together right then and there, Mr. Magoon?

A. No sir, we never did, not at that time.

144 Q. Well, were you there at all, Mr. Magoon, either before or after this particular piece was knocked down, that day, at that sale?

A. I don't remember.

Q. Do you remember, Mr. Magoon, having said to me and to Mr. Colburn, or to either of us, that you were on your way down there to bid for that particular piece of property?

A. Yes, now I remember; now I remember that I was there—— No, let me see—well, go ahead and finish your question.

Q. Well, to bid for that particular piece of property at that sale?

A. No, I didn't state that.

Q. You did not?

A. No sir.

Q. Well, is it not a fact that you did go down for the purpose of bidding upon that property?

A. No. Upon the day of the sale?

Q. Yes.

A. No, I didn't go there for the purpose of bidding on the property on the day of the sale.

Q. Searching your memory once more, Mr. Magoon, is it not a fact that you were there when I made protest against that sale and stated my reasons, namely, first, that there was no jurisdiction to enter the judgment, and second, that the sale had been enjoined by the court?

A. Absolutely not. I am sure that I was not there, so it is not a matter of recollection, but I know that I was not there, and I didn't hear that—I don't remember of ever hearing you make that protest.

Q. Do you remember the fact of having come to my office and talked with Mr. Colburn and myself and volunteered your evidence in favor of Maile in setting aside that sale because
145 of the grossness and inadequacy of the consideration?

Mr. LIGHTFOOT: I object; that is utterly immaterial in this case. That would simply show Mr. Magoon's opinion.

The COURT: Objection sustained.

The WITNESS: I wanted to answer the question, because Mr. Ashford is laboring under a very great misappehension.

Mr. ASHFORD: Answer your question then.

A. I remember of going to Mr. Ashford's office; I remember it very distinctly. Mr. Colburn was present, Mr. Maile was also present. I remember the circumstances of going to the office, and as Mr. Ashford is laboring under a mistake I would like to state, Mr. Maile came to me, I think it was—I don't remember what it was; it was something for something—I don't remember just in what connection it was that I met Mr. Maile, but we walked down to Mr.—down to the Kapiolani Estate building together, and went upstairs together, and then we went into Mr. Ashford's office together and Mr. Maile did not talk English very well and he wanted to say to Ashford and it seemed that Mr. Ashford did not quite understand. It was about the case and I acted as interpreter; and then in connection with that I said to Mr. Ashford—and then I don't know, I think that perhaps Mr. Colburn was present by that time,—I asked Mr. Ashford how the case was getting along or something to that effect, and said that I had been to the sale, or to the station house to attend the sale, the week before the property was actually sold, and had gone there with the intention of bidding on the property and would have bid more than Mr. Van Giesen bid, but that the sale was postponed; and upon the day that the sale took place I forgot all about it and didn't go, and I think I told him—possibly I don't
146 remember now of this exactly—that I went to the station house after the sale was over and found out that the property had been bid in by Mr. Van Giesen, and that I—well, that is as far as I can definitely remember. I think what I said but I don't want to put it in, because I might—perhaps I didn't say it.

Q. Is it not true that you made Mr. Van Giesen an offer of a thousand dollars for his bargain, or thereabouts, upon that piece?

A. Yes, I think—I think that is what I wanted to say. I think that I said to Mr. Colburn,—either of you,—at that time that I had offered Mr. Van Giesen a thousand dollars for that piece of land, and I would have given him a little more, possibly 1200, but that I wouldn't give any more than that, and that Mr. Van Giesen had refused to accept the amount which I was willing to give; $1200, I think, was the outside limit that I said that I would give Mr. Van Giesen for the property. That was before I knew of any contest as to the sale.

Q. Prior to that, however, you had given $1500 for a leasehold and you were then only willing to give 1200 for the fee, is that the idea?

A. Yes, the way I bought that leasehold was not because I wanted

the leasehold, and I wouldn't have given $1500 for it, but Mr. Humphreys was then trying to get a site for the "Republican" and he came to me, having found out that this leasehold was for sale, and wanted me to buy this property, and I negotiated for the property and bought it, bought the leasehold. He told me that he would agree to give me a certain figure and I think it was—I have forgotten exactly now what the figure was; and after I bought it Mr. Humphreys said he didn't want it, so it was saddled on to me.

147 Q. But ever since, you have been paying out some $17 a month and taking in from forty to sixty.

A. Whenever I have been getting anything I have been. It happened to be that it was—it turned out to be a good thing, but from this time on you can depend upon it, unless the building is changed, it will be a bad thing for anybody that has it.

Mr. LIGHTFOOT: Do you wish to say anything else?

A. I think I have said all I know about it.

Direct examination of C. B. MAILE, called and sworn.

Mr. ASHFORD:

Q. You are the plaintiff in this case?

A. Yes.

Q. Calling your attention to a piece of land claimed by you up near the asylum at Kawaiiki, which is also in Keoniula, I ask you if you have any other piece of land in Keoniula except that piece which is in Kawaiiki?

A. Yes.

Q. That is another piece of land besides that piece in Keoniula?

A. The land of Kawaiiki.

Q. My question is this, besides the piece of land at Kawaiiki have you any other piece of land in Keoniula, or have you had since 1902?

A. Yes.

148 Q. What other piece of land have you in Keoniula besides that piece of Kawaiiki?

A. I have another piece of land in my wife's name.

Q. That is where you live?

A. Yes.

Q. But that is not in Keoniula, is it?

A. Where we live has a different name.

Q. Yes, it is Kaoawai, is it not, where you live?

A. Yes.

Q. Now then I will ask you the question again, have you one piece of land or two pieces of land in Keoniula?

A. One.

Q. One. That is the land of Kawaiiki then, eh?

A. That is another piece up in Kawaiiki.

Q. It is the piece at Kawaiiki I am talking about. Kawaiiki is a small land inside of the larger land of Keoniula, isn't it?

A. No.

Q. It is not?

A. No.

Q. State to me, if you please, where Kawaiiki is with reference to the asylum.

A. It is up near the insane asylum.

Q. Isn't that the only piece of land that you have in Keoniula?

A. Kawaiiki is a different land and this land Keoniula is a different one.

Q. Whereabouts is this other piece of land that you say you have at Keoniula; if it is not Kawaiiki where is it?

A. According to the naming of the place there Kawaiiki is a different piece of land, up near the asylum, and where we are living is a lele from Keoniula to where we are.

Q. You claim then that Keoniula reaches down to where
149 you live then, do you?

A. Keoniula is a lele of Kawaiiki.

Q. Very well. I am not asking about your wife now, remember, but do you own any piece of land at Keoniula besides this piece at Kawaiiki, yourself?

A. That land that is adjoining Keoniula is mine.

Q. Where?

A. At Palama.

Q. Where you live?

A. No.

Q. Where?

A. Where the Girls' Industrial School is and mauka of it.

Q. That is not Keoniula, is it; isn't that Kapalama?

A. It is called Palama sometimes.

Q. Well, isn't it a fact that the land of Palama lies on the west, Ewa, side of Keoniula?

Mr. MAGOON: I object. This is his own witness, and it seems to me that it is perfectly plain.

Mr. ASHFORD: I am just trying to show that what appeared to be plain is not plain, is not the fact at all. I wish to show that this piece of land at Kawaiiki is also in Keoniula and it is the only land that this man has or ever did have in Keoniula, and that it is assessed at an aggregate value of $1500.

Mr. MAGOON: I object to it on the ground that he has answered a dozen times that he has another piece of land there.

The COURT: Well, he may be mistaken. So as to avoid any mistake——

Mr. ASHFORD:

Q. I asked a question as to whether Kapalama is not a distinct and separate land lying to the Ewa side of Keoniula?

A. Well, this land I am speaking of in Palama is
150 Kuniakea's land, is on the Ewa side of this land, alongside of it with the road dividing between them.

Q. On the 25th of May 1904 where were you living?

A. This place referred to before,—Kaoawai.

Q. What business were you pursuing at that time?

Mr. MAGOON: I object. Entirely immaterial.

Mr. ASHFORD: It is preliminary.
(Objection overruled.)

A. I was selling dried fish and salmon at the time.

Q. Had you any personal property at that time out of which an execution against you—upon which an execution against you might have been levied?

Mr. MAGOON: I object to it, being entirely immaterial.
(Argument.)
(Case continued until ten o'clock Wednesday morning.)

151 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

C. B. MAILE
vs.
J. W. PRATT ET AL.

JAN. 2, 1907.

Direct Examination of C. B. MAILE resumed.
(Argument. Objection overruled.)

Mr. ASHFORD:

Q. The question to the witness is whether on the 25th day of May 1904 and thence to the 5th day of July 1904 he had any personal property upon which an execution might have been levied, and if so, what was it?

A. Yes.

Q. What was the personal property that you had?

A. Well, the business that I was carrying on at the time was the sale of salmon, dried fish, and so on, besides furnitures that I had in the house.

Q. Speaking of the furniture that you had in the house, etc., will you describe it, in quality, kind, quantity, etc.

A. Some chairs, some wardrobes, and curtains and other
152 fineries for the house.

Q. What about the calabashes?

A. Yes, some.

Q. Well, about what number and of what value; old or modern?

Mr. MAGOON: Well, can't we get an answer to the question? Have you withdrawn the question?

Mr. ASHFORD: No, I do not. Let him describe it.

A. I don't remember the number of calabashes, but I know that there were some calabashes.

Q. Well, with regard to the age, quality and value of those calabashes, what about it?

A. Some were old, others were new.

Q. Any koa furniture?

Mr. MAGOON: Hold on; he hasn't answered the question.

Mr. ASHFORD: Well, is he going to answer?

A. Well, there were fifty, more or less, of these gourd, gourd calabashes, you know.

Q. Fifty, more or less?

A. Yes.

The COURT: Does he give the value?

A. No, $50, more or less was the value of the gourd calabashes that I have, and there were some other—some wooden calabashes.

Mr. ASHFORD:

Q. Well now, in regard to the wooden calabashes——

Mr. MAGOON: Has he answered all?

The INTERPRETER: No, he said that he was asked to sell some of his wooden calabashes but he didn't sell any.

Mr. ASHFORD: Well, was he offered any particular price?

Mr. MAGOON: We object to the offer. He can't say what anybody offered him.

The COURT: The objection is well taken.

153 Mr. ASHFORD:

Q. What was the value, if you know, of your wooden calabashes, or any of them?

A. Well, during the times when there was a craze on for calabashes, well, during those times those calabashes or some of those calabashes that I have would be worth ten dollars and upwards; some would be less than ten dollars.

The COURT: How many calabashes did you have altogether?

A. Well, it is not less than ten anyway.

Mr. ASHFORD:

Q. How large is the largest of them, those wooden calabashes?

A. That is about two feet and less in diameter.

Q. Made of what?

A. Kou.

Q. Is it old or modern, that large one?

A. Yes, it is an old one.

Q. I call your attention to the largest one that you have in your parlor there at home. Can you state about what the value of that is?

A. Well, during the lifetime of Mary Pitman she was often there after this calabash, and has offered me $15, but I wouldn't part with it.

Q. Well, in speaking of your salmon business, what stock were you carrying about that time?

A. Sometimes I would receive ten, sometimes I would receive fifteen, sometimes I would have, or receive, twenty, and then sometimes I would receive five.

Q. Five what?

A. Barrels of salmon.

Q. Now about that time what was the amount that you held in stock, as near as you can remember?

Mr. MAGOON: I object to it on the ground of about the time. At

the very day that the levy was made is the only time that
154 you can fix.

(Argument.)

Mr. ASHFORD:

Q. Well, the 25th, 26th and 27th day of May 1904 what salmon had you, as near as you can state?

A. Well, as I have stated, that is the way that I get my salmon,—sometimes I would get from ten up to twenty barrels from the stores; sometimes I would get five.

The COURT: Well, we don't want to know what you generally did, but we want to know particularly now how much salmon you had on your hands on the 25th, 26th and 27th days of May 1904.

A. It is not in this book of mine, this book that I have here (showing).

Q. Have you any book showing it?

A. Yes, I have.

Q. That will show how much you had at that time?

A. Yes.

Q. Can you produce that book at 2 o'clock this afternoon?

A. Yes.

The COURT: So there will be no mistake, the question is, how much salmon he had on his hands on the 25th, 26th and 27th or either of those days and all of them or anyone of them. Perhaps you can take up some other phase of the matter as long as he can't answer that.

Mr. ASHFORD:

Q. Did you have any money available at that time which you might have paid upon that execution?

A. Yes.

Q. How much?

A. I had $475 ready.

Q. 475.

A. $475 ready, that I had on hand for any trouble that
155 might occur.

The COURT: Where was this,—at your home or in the bank?

A. In John Colburn's hands.

Mr. ASHFORD:

Q. Was any demand made upon you by Sheriff Brown or any of his subordinate officers after the issue of this execution of May 25th 1904 and before the advertisement of the sale of this property?

A. Someone did come.

Q. What?

A. Someone did come.

Q. I am referring now to this third execution, after the time that you had had the talk with Sheriff Brown and after the second execu-

tion had been withdrawn, then was any demand made upon you for the payment of this amount?

A. No.

Q. Now speaking again of this money in Mr. Colburn's hands, are you sure of the amount, or whether it was all in his hands, or partly in his hands and partly in your own at home?

Mr. MAGOON: Well, I say, may it please your Honor, that this is counsel's own witness and that is a leading question.

(Argument.)

Mr. ASHFORD:

Q. Well, are you mistaken in regard to the sum that was actually in Mr. Colburn's hands?

A. Well, that is the sum, that is the amount of money that I deposited with Mr. Colburn.

Q. Well, was all of the sum that you refer to in his hands or was there some of it in your own?

A. No, he had it all.

156 Q. Well, do you remember when Mr. Van Giesen gave you a copy of the original of the summons in the original suit, when the suit was begun against you?

A. I have some remembrance of it.

Q. Well, where were you served?

A. I think it was at the house.

Q. Do you remember Mr. Van Giesen coming to the house?

A. Yes.

Q. What did he do when he came to the house?

A. Well, he showed me a document and it was in English and not under—of course I didn't understand what the contents were.

Q. You say he showed you a document. Did he hand it to you?

Mr. MAGOON: Well, I object now.

Mr. ASHFORD:

Q. Well, what did he do besides showing this to you?

A. That was all he did, was to show me.

Q. Did he hand you any document?

Mr. MAGOON: I wish just what he said. What did he say?

(Repeats in Hawaiian.)

The COURT: What was that?

The INTERPRETER: No, I was telling him that there is a difference between showing, and now I am directing my question whether he gave you.

The COURT: Well, go ahead. What did he say; what is his answer?

A. Yes, I remember that he gave me.

Q. As I understand you he showed you a paper and gave you a paper, is that correct?

A. Yes.

Q. Now the paper he showed you, was that the one he gave
157 you or did he show you one paper and give you another?
A. The one that he showed me was the one that he gave me.
Q. Did you see any other paper?
A. No, I don't remember.

Mr. ASHFORD:

Q. Were you ever notified that Sheriff Brown or any subordinate of his had gone upon—to any one of these three pieces of land and proclaimed a levy, or had fixed up any notice upon any one of them, stating that the levy was made upon it?

Mr. MAGOON: I object to it. It is entirely immaterial.
The COURT: I will permit the question but reserve argument on the matter.
(Question read.)
A. No.

Mr. ASHFORD:

Q. Well, can you say whether or not any such entry was made or notice given or fixed upon any of these properties?
A. Well, all that I can remember is—is what Mr. Colburn told me, that he saw in some of the foreign papers, white papers in town, that my property was being advertised.
Q. Who was in possession of that property?

Mr. MAGOON: I object to that as a conclusion of law.
(Argument; objection withdrawn.)

Mr. ASHFORD:

Q. On the 27th day of May 1904 who was in possession of this piece of land?
A. I was.

(Mr. Magoon questions interpretation.)
The COURT: Can't you ask him direct who was in possession? Isn't there some way of putting it?
A. Myself.

158 Mr. ASHFORD:

Q. Now after you were served with that piece of paper, after that piece of paper was handed to you by Van Giesen, did you go to court to appear or answer or defend that suit?
A. No, I didn't go.
Q. Did you send any attorney or anyone else to appear for you or represent you?
A. Well, I spoke to Mr. Colburn. In consequence of these suits and one thing and another being done to the property I gave him—I left the matter in his charge.
Q. Well, immediately after receiving, say within the next few days or within a day or two after receiving this paper from Mr. Van Giesen, did you do anything—not long afterwards but within a very short time, a few days?

A. Well, it was after I received this document from Mr. Van Giesen that I went to Mr. Colburn. I didn't appoint a lawyer, I didn't do anything else excepting the fact of my going to Mr. Colburn.

Q. Were you represented in court or not?

A. No.

Q. Now we were talking on Monday last about how many parcels of land you have at Keoniula, and you didn't leave it very clear. I would like you to answer that question now. On the 27th day of May 1904 how many parcels of land had you in the ili of Keoniula?

A. One.

Q. State whether or not that was the piece of land conveyed to you by Lucy Kamaka Punipuni and husband?

A. Yes.

Mr. ASHFORD: I desire at this point, if the court please, to
159 introduce the deed of the land in question at Kawaiiki Keoniula.

MR. MAGOON: We admit in the bill that that is the land. You have alleged it in your bill and we admit it. However, if you wish to introduce it in evidence——

Mr. ASHFORD: Very well, I will take the admission. The court will observe that the advertisement calls for the land conveyed to Maile by this deed. I will keep the deed off the record.

Cross-examination of C. B. MAILE.

Mr. MAGOON:

Q. I understand you to say that you don't remember whether or not Mr. Van Giesen had two papers when he came to you?

Mr. ASHFORD: One moment. I object to that. He certainly hasn't said so.

The COURT: Well, the witness can answer that.

A. What I remember is what he gave me.

Mr. MAGOON:

Q. Yes, he gave you one paper.

A. One paper.

Q. And do you remember what he said to you when he gave it to you?

A. Well, my remembrance is that he told me that it came from Brown; I don't know of anything else, but I couldn't read the contents of the document to know.

Q. Well, I mean when Mr. Van Giesen came to you first with the summons to go to court, when he gave you the paper, do you remember what he said to you upon that occasion?

160 A. Well, the only recollection or remembrance that I have is that he said for me to appear before Brown.

Q. Now don't you remember, Mr. Maile, that the summons in the suit was served to you at the market—on you at the market?

A. No.

Q. At the old fishmarket down here (indicating), when Mr. Van Giesen came to you with the summons?
A. No.
Q. Now don't you remember, Mr. Maile, that in the service of the first execution, that is the demand upon you under the first execution, that Mr. Van Giesen went out to your house and told you something about this matter?

Mr. ASHFORD: I object to that. The record which has gone in, has been admitted in evidence, has the return of Albert McGurn as deputy sheriff upon that execution, as being the one who served it or did whatever was done in connection with it.
Mr. MAGOON: I want to find out what was done in connection with the police department with reference to that execution. He said that Mr. Van Giesen went to his house and showed him a paper. Now I want to bring out about that paper. I want to find out about it now.
The COURT: You contend that was an execution and not a summons?
Mr. MAGOON: An execution. Now I think it is proper to show that it is something else than a summons.
(Objection overruled.)

A. Yes, he did.
Q. What did Mr. Van Giesen say at that time when he went to the house?
161 A. Well, he stated to me something of this idea, as if it were coming from Brown.
The COURT: And he didn't leave the paper with you but took it away, did he not?
A. Well, he may have taken it, but I know that sometime I—well, whether I took it or not I don't know, but I know at one time, or sometime, I did take a document, and I tried to find out what its contents were; I couldn't, I wasn't able to take it and therefore I left it alone, as it were, but as to the first document that was given to me, I think that was left with me.

Mr. MAGOON:

Q. Yes. Now are you sure where you were when that document was left with you, that first document that you received; are you sure where you were at that time?
A. Yes.
Q. Where?
A. At the house.
Q. Now how many visits did Mr. Van Giesen make to your house?
A. Once.
Q. And did you see him about this matter any other place?
A. No.
Q. And you are not sure, as I understand you, whether or not it was at the time that you saw Mr. Van Giesen at your house that he gave you this first paper that you spoke of?
A. At the house.

Q. And you retained that paper, did you?
A. Yes.
Q. Now do you remember the time of the day?
A. It wasn't dark, that is it was during the day time, sometime, but I couldn't say at what hour.
162 Q. Your memory isn't very clear about what took place at that time, is it?
A. No, it is not clear. I couldn't say that this document purported to be so and so and so and so and so; I couldn't—I am not clear upon that point.
Q. I will ask, to be sure, did you ever see Mr. Van Giesen about this judgment before or after the time that you saw him at your house about this matter of the suit?
A. I said that I only have seen him once.
Q. Now where was your stall in the latter part of 1903, in November?

Mr. ASHFORD: It is immaterial where it was in November. This document was not issued until December.

Mr. MAGOON:

Q. 7th of December. Where was his stall at that time?
A. I think it was down to this old fish market here.
Q. Now as soon as you received that paper, did you not take it the same day to Mr. Colburn?
A. No.
Q. When did you take it?
A. Well, it was left a long time afterwards, and then some one else came,—not Mr. Van Giesen but another man. It was some time, some long time afterwards; might have been some months afterwards, when another policeman came to me; it was Waipa, and he came to me at Kawaiahao here and told me to go to Mr. Brown.
Q. Yes, now did you know what Mr. Waipa came for?
A. He told me to go and see Mr. Brown.
Q. Tell you for what, what purpose?
A. That Brown wanted to see me.
The COURT: I would like to find out whether you knew
163 the man that came; did you know him?
A. You mean Waipa?
Q. The man that brought you the paper?
A. Yes, I know Waipa.
Q. It was not Albert McGurn?
A. No.

Mr. MAGOON:

Q. Didn't he tell you that judgment had been rendered against you for taxes and that the sheriff wanted to see you about paying the amount?
A. No, he did not.
Q. Well now, was it before Waipa came to you or after Waipa came to you that you went to Colburn?

A. Waipa came to me first and then afterwards I went to Colburn.

The COURT: Did he have a paper?

A. No, simply an order, verbal order.

Q. Oh, just simply to go and see Brown?

A. Yes.

Q. And didn't say what for?

A. All that Waipa did was to come to me and tell me that Mr. Brown wanted to see me.

Q. Was there anything said about your taxes?

A. No.

Q. Anything said about money?

A. No.

Mr. MAGOON:

Q. Now did you go to Brown in answer to that summons?

A. Yes.

Q. And what did Brown tell you?

A. Well, I went down to see Mr. Brown to make arrangements with him in regard to these taxes, and I told Mr. Brown that I would go home and think over as to what I would do in the premises, and in the mean time I went over and I saw Mr. Col-
164 burn and left the matter with him, and it has been in his hands ever since up to date.

Q. Now how long before that was it that judgment was rendered against you for these taxes?

A. Well, the court may have given judgment, that is not very long prior to that.

Q. Now Mr. Maile, why didn't you go down to the court?

Mr. ASHFORD: I object; absolutely immaterial.

Mr. MAGOON: It is only in reference to showing that he is mistaken in certain things. I want to show knowledge that he had.

The COURT: Objection overruled with that understanding.

Mr. ASHFORD: I would like to accentuate this particular point by having an exception go on the record.

The COURT: Very well.

Mr. MAGOON:

Q. Now why didn't you go down to the court on the day set for the hearing of the case?

A. I didn't know anything about this matter, and it was only through Mr. Colburn that I became aware that my property was being involved or being published in the papers for sale through taxes.

Q. Well, but you said you went to Mr. Brown to settle about your taxes and you told him so; now what——

Mr. ASHFORD: No.

Mr. MAGOON: How did you come to make that statement to Mr. Brown that you came to him to settle about the taxes?

Mr. ASHFORD: I object to this, because the effect may be to confuse the witness. His reference to the visit to Brown was after the

judgment. It cannot serve any purpose to show why he didn't appear in answer to the original summons.

165 The COURT: I will permit the question.

A. Well, it was in relation to this business, to this affair and his idea of a settlement of the taxes.

Mr. MAGOON:

Q. Yes, but the proposition came from you, did it not? You told him when you went there that "I have come to settle about my taxes" did you not?

A. I was sent for by Mr. Brown and I went down at his request to see him, and when I got there Mr. Brown asked me if I was Mr. Maile, and I said I was, and then he broached the subject to me of my lands being involved in taxes, etc., and there was a talk between him and I in regard to taxes and afterwards my mind then reverted back that I wanted to go back and think it over and possibly to save up a few dollars in order to pay off this matter.

(Recess until 2 o'clock.)

Afternoon Session, Jan 2, 1907.

Direct examination of J. F. COLBURN, called and sworn.

Mr. ASHFORD:

Q. Mr. Colburn, will you state whether or not you sustain any business relations to Mr. C. B. Maile, and what they are?

A. Oh, business agent.

166 Q. Since when?

A. The early part of March, I think, 1904.

Q. Since the latter part of March?

A. Latter part of March.

Q. Do you remember the occasion of the issuance of what has been referred to here upon this trial as the second execution in the suit of James W. Pratt, tax collector, against Maile?

A. I do not.

Q. What?

A. I do not. I haven't become familiar with the executions until of late; that is the one, two and three.

Q. Do you remember having had any talk with Mr. Brown, High Sheriff, in regard to the so-called second execution, as a result of which it was withdrawn?

A. My conversation was with Andrade.

Q. Andrade?

A. I think on two or three occasions, yes.

Q. Now bring your mind to the date of May 25th, and thence to May 27th, inclusive, 1904, Can you state whether or not you had any funds in hand belonging to Mr. Maile?

A. I did.

Q. What amount?

A. $475.

Q. Can you state whether any demand was made upon you, as Maile's agent, for the payment of this so-called execution, prior to the advertising of the sale which we now bring this suit to set aside?

A. No sir, there was not.

Q. Are you familiar with the geography and names of the lands in that part of Honolulu lying Ewa of Liliha street between King and Judd street-?

A. I have some knowledge.

167 Q. Do you know the lands called Keoniula?

A. Yes sir.

Q. What is it?

A. Land of Keoniula is, the lands, I say lands speaking of them in their subdivision names, bounded by Judd street, running down on a line meeting the Asylum Road, King street and Liliha.

Q. Is it an ahupuaa?

A. I—it is an ili.

Q. Do you know the land of Kawaiiki?

A. Yes sir.

Q. Where is that land?

A. It is, I should think, about 400 feet away from the gate of the insane asylum towards the east, easterly direction.

Q. In what larger land is it located?

A. In Keoniula.

Q. Do you know whether C. Maile, at any time between May 25th and July 5th 1904 owned any lands in Keoniula?

A. He owned this land of Kawaiiki and named in the description of sale——,

Q. Any others?

A. Of the sheriff. Not that I know of.

Q. Do you refer to the land conveyed to him by Lucy Punipuni?

A. Yes sir.

Q. Are you familiar with that land?

A. Yes sir.

Q. Have you had any experience in regard to the buying and selling and valuing of lands in Honolulu?

A. To some extent.

Q. What has been your experience?

Mr. MAGOON: I admit that he is qualified to testify as an expert.

168 Mr. ASHFORD:

Q. Speaking as an expert upon land values, then, what is your estimate of the value of that piece of land covered by the deed of Lucy Punipuni to Maile, located at Kawaiiki in the ili of Keoniula?

A. Well, really, I want to correct a statement about the land of Kawaiiki,—saying that Maile had one piece of land. It comes to my occurrence now that Maile did have one piece of land, but in conveying to the government a strip of this land, whereby School street to be extended through, the government gave him a patent to a taro patch there of about 2700 square feet, so that in reality he owns this land commission award and this small grant of 2700 feet.

The COURT: That was given in lieu of the land for the——
A. Yes; shown by that abstract.

Mr. ASHFORD:

Q. Have you that abstract with you?
A. But he acquired this 2700 feet in the early part of 1904, so that the assessments prior to that have not—were not—Simply want to correct, that Maile, individually, owns two pieces of land covered by a patent, by a royal patent grant, and an award.
Q. If you will just hand me that I know just exactly where to find it. Haven't you got it there? You took it out of my office at noon.

Mr. MAGOON: Ask Mr. Mossman to go down and get it. It is all right; we all saw it.
Mr. ASHFORD: The whole map we had here.
The WITNESS: Yes, I think it is on my desk there yet.

Q. So that practically it is now, together with the little piece conveyed to him, it is almost square altogether?
169 A. Yes, and has a frontage of 117 feet on the extension of School street.
Q. Well, this little strip that you spoke of being conveyed to him by the government adjoined this other piece?
A. Well, it just squared off an L in the award.
Q. And adjoins the award, adjoined it?
A. Yes, adjoins the award.
Q. Practically and then makes one piece?
A. One piece of land, almost square. It is square in the rear.
Q. Well, as to the value?
Mr. MAGOON: That is since the—before the execution or after the execution?
A. I think it was some time in May 1904.

Mr. ASHFORD:

Q. 18th of May, I think, a few days before the execution issued?
A. Yes.
Q. I am speaking of that grant 2460, and this is leaving out this small piece acquired from the government. What is your estimate of its value?
Mr. MAGOON: At that time, in 1904?
Mr. ASHFORD: Yes.
Mr. MAGOON: At the time of the execution sale?
Mr. ASHFORD: One acre and .02 is the size of it, less the little piece taken off for the street.
A. 2300 square feet was taken for the road.
Mr. MAGOON: That would be about a tenth?
A. 20th I think.
Q. Would be about——
A. A twentieth of an acre.
Q. A fifth of an acre.
A. No, not a fifth of an acre; 20th of an acre.

170 Mr. ASHFORD:

Q. Well, what is your estimate, Mr. Colburn?
A. I should say that was worth at least $1250.
Q. What is the character of the land?
A. A house lot and taro patches. Most of the land now has been drained and made available for building sites by being—fronting on the road,—worth more today.
Q. Are you familiar with the Pauahi street lot referred to in the bill of complaint?
A. Yes sir.
Q. What is your estimate of its value?
A. Land almost in the vicinity of Pauahi street, namely, the Mendonca and Vierra block—that is where the old stone building now stands on the corner of Nuuanu and Chaplain street—I understand that the owner refused——

Mr. MAGOON: O well, I object.

Mr. ASHFORD:

Q. Well, give us your estimate of value from any information you have?
A. Not less than 75 cents a square foot.
The COURT: How many square feet are there?
A. 2300 I think, 2380 square feet I think.

Mr. ASHFORD:

Q. About $1500. I suppose you heard Mr. Holt's estimate of a dollar and a half a square foot?
A. Yes sir.
Q. What do you think of that?
A. Well, I am just giving my values.
Q. Are you familiar with this lot on Alakea street mentioned in the bill?
A. I am.
171 Q. What is your estimate of the value of that piece? To begin with, what is its area?
A. About 4300 square feet, I think.
Q. What is its frontage on Alakea street?
A. If I am not mistaken, about 46 feet.
Q. And how much in your opinion is that worth a square foot?
A. Beg pardon?
Q. How much per square foot is it worth in your opinion, irrespective of the buildings?
A. I should say that land is worth a dollar and a half a square foot.
Q. Is there anything else that you wish to say in conection with this matter?
A. In connection with this Alakea street piece I would like to compare land on Fort street; I suggest Mr. Magoon was comparing it the other day. We all know that within the last sixty days a piece of land on Fort street, between Merchant and King, sold for fifteen dollars and a quarter a square foot.

Q. Where was that?
A. Charles M. Cooke's purchase from W. E. Foster, within the last sixty days.
Q. Corner of where?
A. The Foster building there, above McInerny block.
Q. On Fort street?
A. Yes sir; sold $15.25 a square foot, with just a building on it yielding a hundred dollars a month.

Mr. MAGOON: Now I object to that kind of testimony and ask to have it stricken out; different location, can't have any possible bearing——

The WITNESS: I mentioned simply the fact that you com-
172 pared Alakea to Fort street the other day in your evidence, being permitted to go on.
Mr. MAGOON: It may be stricken out?
The COURT: Yes.
The WITNESS: And I have a standing offer from William McCandless——
Mr. MAGOON: I object to that standing offer.
The WITNESS: For this piece of land in question.
Mr. MAGOON: I think it is not evidence. That does not signify,—what a man will give.
The COURT: Yes, I think his opinion is——
Mr. ASHFORD: All right.

Q. Anything else, Mr. Colburn?
A. The land in 1904 was subject to an annual rental of—was under lease for a term—for a balance of a term of seven years, an annual rental of $204; that the lessee under the covenants of the mortgage—of the lease was——

Mr. MAGOON: I object. If you wish the lease you can produce it, or you can ask us to produce our copy, if we have one.
Mr. ASHFORD: All right, we have it. C. B. Maile to Chang See. Is that the one to which you refer?
A. That is the one.
Mr. ASHFORD: Well, we will ask you to produce your copy, Mr. Magoon.
Mr. MAGOON: We haven't it here. If you have a copy we have no objection to your copy.
Mr. ASHFORD: Very well. It seems to be a carbon copy.

Q. Without filing this, I will ask you, Mr. Colburn, to point out the covenant that you are about to refer to.
173 A. It is a covenant whereby the lessee is supposed to keep those buildings in a condition, not such as they are now and a menace to other property, and——

Mr. MAGOON: Well, I object to that.
Mr. ASHFORD: Let's have what the papers say.
The WITNESS: Using your own language the other day, Mr. Magoon. Well, it is a covenant whereby the lessee is supposed to keep them—it is in Hawaiian.

Q. Just translate it.
A. That is the translation of it.

Mr. MAGOON: Will you read the Hawaiian of it, please, and give your idea of the translation.
(Witness reads in Hawaiian.)
Q. Now will you give the English translation of that?
A. That the party of the second part shall repair and keep in good condition, and build if necessary, the houses and fences upon the land.

Mr. MAGOON: Well, we object to Mr. Colburn being translator, your Honor.
The COURT: You object to the translation?
Mr. MAGOON: I should say so.
Mr. ASHFORD: I will ask Mr. Hopkins, then.
Q. Point out the passage to Mr. Hopkins, will you, please.
The INTERPRETER: "The party of the second part is to build and to repair the houses and fences and all things that may be necessary for the land, at his own expense."
The WITNESS: I said the use of the word "hooponopono" is to keep repaired, keep in repair.
Mr. MAGOON: We will take the translation. Even Mr. Hopkins has given a very liberal translation of the word "hooponopono".
The COURT: What is the translation of it, Mr. Hopkins?
174 The INTERPRETER: I said repairs.
The COURT: Does that mean also to keep in repair?
The INTERPRETER: Well, it says here, "and to repair the houses and the fence."
Mr. ASHFORD: Does that convey to your mind the idea of not only repairing but also of keeping in repair?
Mr. MAGOON: Well, I object to that. Mr. Hopkins has given a translation; put him on the stand.
The COURT: The question is whether or not that means the repairing once, or shall it be kept continuously in repair. (To Mr. Hopkins.)
The INTERPRETER: "This is another thing that is agreed to by the two parties, that the party of the second part is to pay the water rates to the government"——
The COURT: Does it say "water rate" or "water rates"?
The INTERPRETER: Well, it says "water rate." "To the government, and each and every year that the party of the second part is to build and to repair the houses and fences and all things necessary to the land, at his own expense.
Mr. ASHFORD: Well, that is all right; we will let that go. Anything else, Mr. Colburn?
A. That's all.

Cross-examination.

Mr. MAGOON:

Q. How many square feet do you say is the area of that lot, Mr. Colburn, on Alakea street?

A. I think it is 4300.

Q. Now in Mr. Maile's complaint here he gives it as 43
175 by 52. Do you have any reason to doubt the figures there?

A. The size of the lot?

Q. Yes.

A. Oh, there may be a discrepancy in the—typographical error; it may be 82. I think it is 80 odd feet depth.

Q. Then are you figuring, then, as to the valuation, upon 80 feet depth, or on——

A. I am figuring on the valuation of it per square foot, whatever that—whatever the area of that piece of land is.

Q. So it does not make any difference whether that lot is 40 feet deep or 80 feet deep in figuring out the value of this land per square foot?

A. Repeat the question.

Q. In your opinion you do not take into consideration whether the lot is 40 feet deep or 80 feet deep in arriving at the figure of a dollar and a half per square foot as the value?

A. No, I am taking it upon the value of its being 80 feet deep.

Q. Now if it is 2236 square feet, as alleged in the complaint, being 43 by 52, that would make the value of the land, according to your estimate of a dollar and a half per square foot, $3354?

A. Yes, if your computation is correct.

Q. Yes, $3354. Now that land is under a present rental of $17 a month, $204 a year, and the lessor of course, Mr. Maile, has to pay the taxes; do you consider that that is a fair return on $3354?

A. Yes sir, for that kind of property, that lease gradually waning out.

Q. What do you consider the value of the leasehold?

176 Mr. ASHFORD: I object. The leasehold is not now in controversy and it is not cross-examination.

The COURT: It is a part of the premises, is it not, just as you might value a house or anything else attached to it? I think it is a part of it.

Mr. MAGOON:

Q. What was that, do you remember?

A. A thousand dollars.

Q. Wasn't it nine hundred and some odd dollars that we fixed upon as being the figure we would take?

A. No, I think a thousand dollars.

Q. Why didn't you buy it?

Mr. ASHFORD: I object. It is immaterial why he didn't buy it

The WITNESS: I will tell Mr. Magoon why I didn't buy it.

(Mr. Magoon withdraws question.)

The WITNESS: I would like to tell you.

The COURT: Well, your counsel evidently does not want you to.

Mr. MAGOON:

Q. Remember about the time that I had a conversation with you as to the matter?

A. About the leasehold?
Q. Yes.
A. Yes sir.
Q. How long ago; when was it?
A. It is before you ran up against Mr. Van Giesen, or he up against you.
Q. You mean by that before Mr. Van Giesen retained me to——
A. I don't know; before he executed the instrument to you that I saw.
Q. Shortly before that?
A. Yes.
177 Q. Well, that doesn't give the court any idea as to time.
The COURT: Idon't know when that instrument was executed.
A. I don't remember the date myself.
Mr. MAGOON: It was about two or three months ago, was it?
A. I could get to the date by reference to a copy book which I have——
Q. Well, was it about the time of the election, as counsel suggests?
A. Yes, just prior to the election. Prior to the election, yes.
Q. Just prior to the election?
A. Yes, I think it is two or three weeks before election.
Q. That refreshes a lot of our minds in the matter, I guess. Now you say I offered it to you then for a thousand dollars?
A. The leasehold.
Q. You didn't want to buy it, that is, you didn't buy it?
A. I would have bought.
Q. But you did not buy it?
A. I did not, no.
Q. And you did not tell me that you would buy?
A. I told you I would give you an answer.
Q. You never did give me an answer?
A. You prohibited me.
Q. I prohibited it? In what way?
A. By executing the agreement with Van Giesen.
Q. Oh, by coming into the case and prosecuting the case I prohibited you from buying?
A. Yes.
Q. Did you withdraw the offer?
A. No.
Q. It never has been withdrawn, as far as you know?
A. No.
178 Q. But as a business speculation, independently of this suit, you don't want to buy that leasehold for a thousand dollars, do you?
A. If Mr. Van Giesen will carry out the—will execute the deed that his attorneys agreed upon with me to execute I will pay you a thousand dollars for that leasehold today or tomorrow.

Mr. MAGOON: I object and ask it stricken out. I want to know if Mr. Colburn is ready to give a thousand dollars for that leasehold.

A. With this suit pending?
Q. Yes, today.
A. No sir.
Q. As a business speculation, Mr. Colburn, will you today give a thousand dollars for that leasehold?
A. If Mr. Maile had the title of that property today.
Q. Excuse me?
A. I will not.

Mr. MAGOON: I object to the answer (meaning preceding answer) and ask to have it stricken out. I want to know as a business proposition whether you would give a thousand dollars for that leasehold today or not?

Mr. ASHFORD: I submit that certainly is not a question to ascertain value, whether he will give it or not. That is immaterial.

The COURT: I think it is immaterial.

The WITNESS: Now you know, Mr. Magoon, that I was seeking to buy for Mr. Maile; I was not bidding in my individual capacity to buy the leasehold, but to secure the leasehold back to Mr. Maile, so that his property would be free of that incumbrance, was the reason I was negotiating with you upon the amount of a thousand dollars, but as to my individually wanting to pay a thousand dollars for it, of course not.

179 Mr. MAGOON:

Q. As a business man today, if you were in the market to buy a leasehold of that nature, what would you give for it?
A. It depends on how you tied it up with the Chinaman that is there.
Q. Well, we will say entirely free from the Chinaman,—because he can't pay anything, so we can get rid of him all right,—free from any incumbrance at all so far as the lessee is concerned, what would you advise your client to give for it?
A. Not anything with this suit pending.
Q. What has this suit to do with it, Mr. Colburn?
A. It has a great deal to do with it.
Q. Well, what?

Mr. ASHFORD. Oh, this is asking for an argument.

Mr. MAGOON:

Q. Now as to the lands on Pauahi street, is that land leased?
A. No sir.
Q. Has it ever been leased, to your knowledge?
A. It has been occupied; whether leased or not I don't know.
Q. What's that?
A. It has been occupied; whether leased or not I don't know.
Q. There are no improvements on the land are there?
A. No sir.
Q. And as far as you know the land for years past has been lying idle and producing no income, as far as you know?
A. Yes.

Q. Now with reference to the land at—land up there in Keoniula or whatever it is—what is the name of the land, Kawaiiki? Is that land leased so far as you know?

180 A. I really don't know.

Q. And you don't know whether it has produced any income in the last four or five or six years, do you?

A. I think it has.

Q. I am asking you if you know?

A. I know it has been cultivated, and whether it is on shares or leased out I can't say.

Q. You don't know anything about the amount of the income per annum?

A. No sir, I do not.

Q. Now you said you had several conversations with Mr. Andrade about this matter; what was the first conversation that you had, as far as you can remember?

A. Oh, it was in reference to the payment of the money, the payment of the taxes.

Q. When was that with reference to the third execution?

A. I don't remember.

Q. Well, what took place at the conversation, as far as you can remember, at the first time?

A. I think it was in relation to making a payment on account. Mr. Andrade declined to accept it; he wanted the whole amount paid.

Q. What was the amount mentioned; do you remember about what amount it was?

A. I think somewhere in the neighborhood of $400.

Q. Did you tell Mr. Andrade that you had the $475 in your hands?

A. Yes—No, I didn't tell him what amount, but I told him I had some money belonging to Maile.

Q. And did you have as a matter of fact the $475 in your hands at that time?

A. Yes sir.

181 Q. Well now, what did you say when Mr. Andrade suggested that he wanted the full amount paid?

A. I said I was unable to at the present time, unable to pay it at that time.

Q. Well then, what did you mean by that, if you had the $475 in your hand?

A. Well, the taxes were something over $500.

Q. The taxes were for something over $500? I thought over $400.

A. Over $500.

Q. Did you as a matter of fact tender Mr. Andrade anything on account of the judgment?

A. I did not.

Mr. ASHFORD: One moment. I submit this is utterly immaterial, and is not cross-examination.

The COURT: He said he did not, anyway.

Mr. MAGOON:

Q. Well, what is the next conversation? Well then, let me ask you, to be sure about it, do you say positively that Mr. Andrade refused to accept anything on account of the judgment?

A. That is my recollection.

Q. What did he say in that connection?

Mr. ASHFORD: I object.

Mr. MAGOON: I wanted the full conversation.

A. I don't remember just exactly what was said. I have covered the gist of what I remember.

Q. All right. Then you haven't any idea when that conversation was, Mr. Colburn?

A. I do not.

Q. Now the next conversation you had with him—you said
182 you had several—what took place?

A. I think it was upon the same lines.

Q. Do you know whether that was prior to the levy under the third execution and after the second execution had been returned?

Mr. ASHFORD: One moment. This assumes there was a levy, which we dispute.

Mr. MAGOON: Well, the so-called levy.

Mr. ASHFORD: The advertisement.

Mr. MAGOON: That is all right, yes. Between the—that is after the second execution and before the levy, so-called, under the third execution, did you have any conversation with Mr. Andrade?

A. I couldn't say when it was.

Q. Could you give us the substance of the second conversation?

A. I just told you——

Mr. ASHFORD: One moment. I submit that we are drifting entirely away from the issues in this case.

(Argument.)

The COURT: I think it is cross-examination.

Mr. MAGOON:

Q. Did you ever say to Mr. Andrade that you had $475 with which to pay on account of the judgment?

A. I have answered that question before.

Q. Excuse me; I have forgotten.

A. I said to him that I had some money, not stating the amount.

The COURT: Let's see. Can you say whether or not you gave him to understand that you had the full amount to pay the taxes, whatever they were?

A. I gave him to understand that I didn't have sufficient
183 to pay the whole of the taxes.

Mr. MAGOON:

Q. Didn't you, upon one of those conversations, say to Mr. Andrade that you would settle the matter if they would withdraw the execution?

A. I don't think so. I really don't remember.
Q. Don't remember?
A. No.
Q. Now what conversation took place at the last time that you met Mr. Andrade, as far as you can remember?
A. It may have been asking for further time, pleading for time; it may have been—it might have been upon these same lines,—Maile requiring more money.
Q. Did you notify Mr. Andrade that it would be necessary for him to get more money in order to pay the execution or pay the judgment,—Mr. Maile?

Mr. ASHFORD: Now that also, if the court please, is absolutely irrelevant.
(Objection sustained.)

Mr. MAGOON:

Q. From March, the latter part of March, until the 25th day of May when the execution was taken out, did you make any effort, Mr. Colburn, to get the balance of the money to pay the judgment?

Mr. ASHFORD: This we submit is utterly immaterial.
(Objection sustained.)

184 C. B. MAILE recalled.

Mr. ASHFORD: I would like to resume the direct examination for the purpose of ascertaining his stock in hand.
The COURT: Showing the amount of salmon he had on the 25th, 26th and 27th days of May.
Mr. ASHFORD: Yes.
Q. Mr. Maile, have you found the memorandum book which shows the stock you had on hand May 25, 26th, 27th, 1904?
A. During my excitement, because I left the office five minutes to two, I went home in a rush and picked out the wrong book. I know that there is a book but I picked out a wrong book, and this book that I have got here is 1894 instead of being 1904.
Q. Well, if this case goes over to tomorrow can you then produce the right book?
A. Sure.
Mr. ASHFORD: Very well. I will leave him then for further cross examination.

Cross-examination resumed.

Mr. MAGOON:

Q. When you went to Mr. Colburn with this matter, Mr. Maile, what did you say to him?

Mr. ASHFORD: I object. That is utterly immaterial, what he said to his agent, and the question is extremely vague, anyway.
(Argument.)

Mr. MAGOON:

185 Q. Well, after you received this paper from Mr. Van Giesen, as you said, what did you first say to Mr. Colburn about the matter?

Mr. ASHFORD: I object. Immaterial what he said.

Mr. MAGOON: About that paper.

The COURT: I will permit that question about the paper.

A. I didn't say anything about it.

The COURT: I will permit that question because I think it is important for the court to know what that paper was.

Mr. MAGOON:

Q. Now when did you place the $475 in Mr. Colburn's hands?

Mr. ASHFORD: I object to that as being utterly immaterial, provided it was in Mr. Colburn's hands at the time of the issuance of that execution and the so-called levy.

The COURT: I think it is proper. I will permit it.

A. Well, it was during the year 1904 anyhow, but as to the day and the month I have forgotten, though I have got a record of it.

Mr. MAGOON:

Q. With regard to this paper which you say Mr. Van Giesen gave you, did you give Mr. Colburn the $475 before that or after Mr. Van Giesen gave you the paper?

A. Not before that.

Q. How soon after the paper was given you by Mr. Van Giesen did you give Mr. Colburn the money?

A. I don't know how many days it was after Mr. Van Giesen gave me the paper.

Q. Well, was it a long time or a short time?

A. Well, it was a long time.

Q. Well now, was it before the first so-called execution was taken out or after?

A. I have already stated that there was a time when a policeman by the name of Waipa was sent to me to go and see Mr.
186 Brown, and after seeing Mr. Brown then it was a little time after that that I gave this money over to Mr. Colburn.

Q. Well, do you know whether or not when you were called to see Mr. Brown the first execution had been taken out?

A. I don't know.

Q. You hadn't at that time seen the advertisement of any levy for the purpose of selling your land under execution, had you, or heard of it?

A. No, I didn't know, but it was from information that I got from Mr. Colburn that my lands were being advertised for sale, that was my—where my information came from.

Q. Well, that was after you had been to Mr. Brown?

A. Yes.

Q. Now was it at the time that you first went to Mr. Colburn that you took this $475?

A. Well, I have met Mr. Colburn several times before that on account of a law-suit that my wife had, and it was after that, after going over to see Mr. Colburn in regard to this law-suit of my wife, that I approached him on this matter of mine.

Q. Now is it not a fact that Mr. Colburn told you that you ought not to pay the judgment and that he would contest the matter and you wouldn't have to pay anything?

Mr. ASHFORD: I object. Immaterial as to what Mr. Colburn told him or what defense Mr. Colburn saw fit to make.

The COURT: I believe it is proper.

A. No.

Mr. MAGOON:

Q. Well then, Mr. Maile, why didn't you give Mr. Colburn enough money to pay the judgment?

Mr. ASHFORD: I object, it is so utterly immaterial.

187 Mr. MAGOON: I am going upon this general rule of equity that is being addressed to your Honor, that's all. That is purely as to the equitable feature of it.

The COURT: I will permit it.

A. Well, I was ready to pay the taxes as I understood it, but Mr. Colburn probably saw that the taxes exceeded or—that is, was greatly in excess on my property, and therefore he advised me that he would make arrangements with me to—in regard to it.

Mr. MAGOON: Yes. Now I just want to ask you, didn't you make a little mistake in translation; didn't he say that he was prepared to pay the difference?

The INTERPRETER: No.

Mr. MAGOON:

Q. Then as I understand, Mr. Maile, that you were prepared to pay the entire amount of the judgment, but it was the advice of Mr. Colburn which prevented you from doing it?

Mr. ASHFORD: That is a very unfair question. He hasn't mentioned the judgment.

The COURT: He used the word taxes.

Mr. MAGOON:

Q. Well, all right. Do I understand then, Mr. Maile, that you were willing to pay the amount of the judgment and were able to pay the amount of the judgment that the district court rendered against you, but that you were prevented from doing so, or deterred from doing so, by the advice of Mr. Colburn?

The COURT: He said he was prepared to pay the taxes. I think it would be fair to the witness to stick to the matter as he has related it.

188 Mr. MAGOON:

Q. The amount of the judgment rendered in the district court was $486.60, ten per cent. penalty $48.66, advertising $1.50, and

costs of court $3.35; total of $540.11. Now do I understand from you that you were able to pay that amount, $540.11, is that what you want to convey to the court?

Mr. ASHFORD: Now I object to that upon its utter immateriality.
The COURT: I will permit the question.

A. Yes, I was ready.
Q. Well now, you say you were ready. Do you mean by that that you had the money ready to pay it; is that what you mean?
A. I had the money.

Mr. MAGOON:

Q. That is, you had $475 in Mr. Colburn's hands, and the rest of the money you had in your own hands or where?
A. Yes, I had it.
Q. Now don't you remember of meeting Mr. Van Giesen and telling Mr. Van Giesen that you didn't have the money to pay the execution?

Mr. ASHFORD: Let's have the particulars as to time and place.
Mr. MAGOON: I can't tell you exactly. About December, 1903, the latter part of December, don't you remember that you saw Mr. Van Giesen and he asked you to pay this?
The COURT: At what place did you see him?
Mr. MAGOON: At his house, Mr. Maile's house.

Q. And asked you to pay the amount of the judgment for the taxes, and you told him that you didn't have the money?

Mr. ASHFORD: I object to that as immaterial, because that
189 was months before the issuing of this execution.
(Objection sustained.)

Mr. MAGOON:

Q. This furniture that you spoke of, Mr. Maile, you didn't make any return of it to the tax assessor, did you, for your personal property?

Mr. ASHFORD: I object as immaterial.
(Objection sustained.)

The COURT: You had no horse, had you, Mr. Maile, or cattle?
A. No.

Direct examination of H. VAN GIESEN, called and sworn.

Mr. ASHFORD:

Q. Mr. Van Giesen, you have been subpœnaed to bring into court any and all contracts or written memoranda executed by you to Mr. Magoon, or to Mr. Magoon and any other person or persons, or to any persons other than Mr. Magoon, concerning proposed conveyance of or incumbrance upon the lot on Alakea street referred to in this bill of complaint; have you that document?

Mr. MAGOON: I object to the question as, first, being indefinite and

unintelligible. That is a privileged communication; that is a reference to the employment or engagement of his attorney in this case. It is privileged.

The COURT: Well, do you contend, Mr. Magoon, that this
190 privilege which the law recognizes between attorney and client is binding upon the client himself; that he cannot be required to disclose what he has done, what he has told his attorney?

Mr. MAGOON: Why certainly; that is the very foundation of it.

Mr. ASHFORD: I have asked him for a document that he has signed, constituting a contract, not constituting a communication to his attorney; and further than that I propose to show that Mr. Magoon was not his attorney and did not become his attorney until after that document was signed and it was through the signature and delivery of that document that Mr. Magoon became his attorney. I propose to show it by this witness.

Mr. MAGOON: You can't show it by this witness, I submit.

(Argument.)

The WITNESS: If the court will allow me to say a word, I will say——

Mr. MAGOON: I don't want you to say.

The WITNESS: Regarding what——

Mr. ASHFORD: You just keep still and let the attorney and myself and the court settle this matter. I am advised that the document itself speaks of values in such a way as to instruct the court as to the value of the property involved, and the value of the property is one of the great elements in this case. It is altogether a most preposterous proposition to make that a defendant can violate an injunction provided the violation consists in something that he does with his attorney.

The COURT: There is no question about —. The only thing is, shouldn't you bring that—for instance, you should allege
191 that as a separate and independent fact and bring it to the attention of the court and we would inquire into that feature of the matter.

Mr. ASHFORD: I want the document shown for its value as evidence as bearing upon the value. The contempt feature is only incidental.

The COURT: But you don't know what it shows.

Mr. ASHFORD: I do know.

Mr. MAGOON: If you can make an affidavit that that document shows any value of this property I will—that is anything like the value, and state what it is—why I will let it stay. Mr. Colburn read it; I showed it to Mr. Colburn.

The COURT: It seems to be aside from the issue.

Mr. MAGOON: Just one statement. Of course counsel said he would like to have it a matter of contempt. Now I want to assure your Honor that there is no more contempt of this court in this document than there is contempt of heaven.

Mr. ASHFORD:

Q. Mr. Van Giesen, were you present at the sale held under the so-called third execution in this case?

A. I was.

Q. You were then a clerk in the office of the sheriff, the high sheriff, or his deputy, were you not?

A. I was.

Q. Was it part of your duty at that period to keep a record of the different sales where they were held under execution?

Mr. MAGOON: I object. What is the object of the question? It hasn't anything to do——

The COURT: I suppose perhaps to show that he did keep the record of this one.

Mr. ASHFORD: I want to show many other things,—who was present, how many were present.

192 A. It was not.

Q. It was not part of your duty to keep a record of the persons present?

A. Not at all.

Q. Was it your practice to do so?

Mr. MAGOON: I object.

(Question permitted.)

Mr. ASHFORD:

Q. Was it your practice to keep?

A. It was not.

Q. Was it your practice to keep even a partial record, as for instance taking the names, if not the names of all those attending, still, the names of some of those attending such sale?

(Question withdrawn.)

Q. Did you, Mr. Van Giesen, take any record or memorandum of the names of the persons or any persons who were present when that sale was called that day?

A. This particular sale?

Q. Yes.

A. No.

Q. Do you know if any other subordinate of the high sheriff kept such a record, such a memorandum?

A. Yes.

Q. Who did?

A. Harry Mossman.

Q. Do you know if that record is available at present?

A. I can't say.

Q. Do you know if it was customary to keep such records, set aside such memorandum?

A. It is.

Q. Do you think that you could find it?

A. I have no idea at all whether I can find it or not. I
193 don't know where Mr. Mossman kept those records.

Q. Do you remember the fact of your being a successful bidder for these three parcels of land described in the bill of complaint?

A. I am.

Q. Do you remember the condition announced there that day that 50% of the sale price must be paid upon the fall of the hammer?
A. I do.
Q. Upon the fall of the hammer, in respect of any one of those parcels, did you make any deposit of 50% of the sale price or any other sum?
A. I offered the deposit of 50%.
Q. Then and there?
A. After the sale.
Q. Upon the fall of the hammer?
A. No, after the sale I did.
Q. You say you offered?
A. Yes.
Q. Is it not a fact that you had not the money and were obliged to make arrangements to raise the money that day?
A. The 50% or the full amount?
Q. Well, any amount.
A. Well, I have the money of my own, over $300.
Q. You had that there with you?
A. Cash, yes.
Q. What did you do with that $300?
A. I told Mr. Brown I am ready to deposit 50% of the total amount at that time.
Q. But you did not?
A. He did not call for the deposit, and I told him that I haven't got the full amount and I desired to make a loan from him if he has any available.
194 Q. That is, you mean the full amount of the purchase price?
A. Purchase price.
Q. Not the full amount of the 50%?
A. I had that, little over $300.
Q. Did Mr. Brown accept your deposit of the 50% when you offered it to him?
A. He said he will hold back until pay at one time, pay the whole amount one day, making two receipts.
Q. Well, you asked him to provide the money for you?
A. The balance, yes.
Q. And what did he do toward providing that money?
A. He gave me the cash.
Q. He went and got it for you, did he?
A. He gave me the money.
Q. You heard Mr. Brown's testimony here upon the stand?
A. Yes.
Q. With regards to arranging a loan for you from Ned Damon. Is that true?
A. I have no idea of that.
Q. No idea of that.
A. Nor what he went to get a loan from Mr. Damon or not, I don't know; only I know I got the money from Mr. Brown; he gave me the money.

Q. Did you not sign a note at Bishop's bank, either to Ned Damon or to Bishop & Co. for that money?

A. No.

Q. Did you sign a note at the station house or elsewhere, made payable to Bishop & Co. or to Ned Damon, for the money?

A. Not at all.

Q. Did you sign a note to anybody?

A. Yes, I did.

195 Q. To whom was that note given by you?

A. To May K. Brown, Mrs. Brown.

The COURT: That is Mrs. A. M. Brown?

A. Mrs. A. M. Brown.

Mr. ASHFORD:

Q. Well, what have you to say with reference to what Mr. Brown said about arranging that loan from Ned Damon; were you a party to that in any way?

A. I was not present at any of that kind at all. I never knew he got the money from Ned Damon; I don't know where he got the money from.

Q. Well, he brought you the cash?

A. He gave me the cash.

Q. Do you remember the amount?

A. I think—Oh, about over $200, I think, he brought me at that time.

Q. Well, was there some at a latter time, or another time?

A. There was another sum; at the following day there was another sum.

The COURT: Well then you signed two separate notes, or all in one?

A. I signed one note for the full amount.

Mr. ASHFORD:

Q. And how long was that note to run?

A. At demand of it; on demand.

The COURT: Any interest?

A. At the rate of 8%.

Mr. ASHFORD:

Q. Has it been paid?

A. The note has been paid. I got the money from Mr. Magoon and I paid the money.

Q. Since Mr. Magoon became your attorney in the matter?

196 A. Yes sir.

Q. You heard what Mr. Brown said, that $550 and something more was borrowed by him for you, and that you gave the note and that he didn't sign it; is that correct?

A. I didn't gave any note at all more than $500—more than $550. The total of the note I gave him something about $550.

Q. About how much?

A. 550, not more than that.

Q. A moment ago you said about 200.

A. The first time. The day following get the balance of that amount, because I need, myself, for some other speculation.

The COURT: So then as I understand you, you got the full amount of the money from Mr. Brown with which you paid for the land at the sale?

A. Yes.

Mr. ASHFORD:

Q. And you——

A. No, I haven't got the balance from him on that date of the sale which I paid, the whole amount of the purchase price, on that very day. The following day he gave me the money that I want to borrow from him, the following day, and gave a note for—one note for the sum, for full—one amount, for both figures.

Q. $550?

A. $550.

Q. Being the exact amount of the aggregate of these bids for the Maile land?

A. $535 I think the amount is——

Q. Now when Mr. Brown handed you the balance to make up the amount over and above what you had you gave no note at all?

A. As I said—I have already stated I gave him a note.

197 Q. When you got the first $200 did you give a note?

A. No, I did not.

Q. You waited until the next day?

A. Until the next day, because I told him I needed more money; if he can furnish me the money I will give him the note.

Q. You were speaking about a speculation. Is it not a fact that you were bidding quite largely at sheriff's sales about that time?

Mr. MAGOON: I object; entirely immaterial.

Mr. ASHFORD: There is another feature here. We have the situation of a clerk in the sheriff's office becoming the purchaser of this valuable property, worth something in the vicinity of $14,000, for an aggregate of $550, and borrowing the money from the sheriff himself who held the sale, borrowing the money from the same man who had refused to accept other bids except that of his clerk and accepting his own clerk's bids upon conditions which he said would not be accepted in the case of other bids, and now I wish to show whether or not he was accustomed to purchase at similar sales about that time, as tending to show, if the court please, a fraudulent concurrence between the minds of the high sheriff and his clerk that resulted in the sacrifice of this particular property. It is all something, if the court please, from which inferences may be drawn.

The COURT: Well, I can see the force of that contention, but I don't believe that the rules of law would accept it. I think the objection is well taken from a legal standpoint.

Mr. ASHFORD:

Q. You say that the note you gave you didn't give until the next day?

A. No; did not.

198 Q. Then it was a note for $550?

A. Yes sir.

Q. And it was a note by yourself to May K. Brown?

A. Yes.

Q. Whom you understand to be the wife of the high sheriff?

A. Yes sir.

The COURT: No security to the note?

A. No security.

Q. No one sign with you?

A. No, only myself. I asked him—whether Mr. Brown requires any endorsement. He says my personal note is sufficient.

Mr. ASHFORD:

Q. And do you know whether or not that note of yours was negotiated at the bank of Bishop & Co. or the note taken to raise the money?

A. No sir.

Q. You don't know or it was not?

A. I do not.

Q. You don't know whether or not it was?

A. No, I don't know.

Q. To whom did you pay the money upon that note here since you engaged Mr. Magoon?

A. To whom did I pay the money for that note?

Q. Yes.

A. To Mr. Brown.

Q. And he produced the note, did he?

A. I don't know whether he produced the note—no, I told him to destroy the note; I had taken it for granted—I took it for granted that the note was destroyed.

Q. Have you got it now?

A. No, I haven't got it.

Q. Have you seen it?

A. No.

The COURT: Well, did you take a receipt for the money, the $550?

A. I did take a receipt.

199 Mr. ASHFORD: You did take a receipt.

Q. Have you that receipt?

A. I haven't got it with me; probably in my file.

Q. Why did he not give you the note at the time you paid the money?

A. I don't know that reason, but——

Q. Where did you pay it to him?

A. Getting the receipt from him was just sufficient so I didn't bother for the note.

Q. Where did you pay the money,—at the police station?

A. At his office.

Q. Nothing said about the note?

A. Nothing said about the note.

Q. Well, did it occur to you that the note would be as good as a

receipt if the note had been handed over, and no occasion for any receipt; didn't that occur to you?

A. I didn't quite understand.

Q. I say, did it not occur to you that if he had delivered the note to you there would have been no occasion for a receipt; but you did take a receipt?

A. I took a receipt from him, signed "A. M. Brown, attorney for May K. Brown."

Mr. ASHFORD: I will ask that the receipt be produced to-morrow.

The COURT: Bring the receipt tomorrow, Mr. Van Giesen.

A. I will.

Mr. ASHFORD:

Q. What was the amount which you paid upon that note?

A. Somewhere over $600, I think; over $600.

Q. Do you remember how much, Mr. ——?

A. I paid near $700.

200 Cross-examination.

Mr. MAGOON:

Q. You say, Mr. Van Giesen, that you got the money from me to pay the note. Do you remember what time it was, about?

A. About, I think, after the election.

The COURT: After the election?

A. After the election.

Mr. MAGOON:

Q. That is this last election, November the 6th?

A. Yes.

Q. And it was how long after you first came to me in the matter?

A. I came to you—see you about the matter something before the election, in the month of November, I think, or thereabout.

The COURT: November or October?

A. November or October, I can't exactly state.

Mr. MAGOON: Yes.

A. I came to you, after I had found something wrong with my attorney, I came to you- attorney—as my attorney.

Mr. MAGOON: That's all.

Mr. ASHFORD: I ask the opposite counsel at this point to admit the allegations of paragraph 8 of the bill, which are neither admitted nor denied.

Mr. MAGOON: 8 is all right; we admit 8. Well, I wish to withdraw that admission, your Honor. I wish to admit that—better make it specific so there can't be any question about it. I wish to admit that Maile did not, either in person or by attorney or otherwise appear before said magistrate or in said district court to respond to said summons.

201 Mr. ASHFORD: I am willing to take that admission also. Now 8 is, notwithstanding the fact that he did not respond, still the magistrate proceeded to give judgment.

Mr. MAGOON: The allegation in section 8 is, as I understand it, admitted.

Mr. ASHFORD: Yes. Now I will ask you to admit No. 11.

Mr. MAGOON: I cannot admit section 11.

Mr. ASHFORD: Now section 12 is neither admitted nor denied. I will ask that it be admitted now.

Mr. MAGOON: I will admit that that motion was filed.

Mr. ASHFORD: As alleged there?

Mr. MAGOON: As alleged.

Mr. ASHFORD: I will ask you to admit the last paragraph of 13, namely, the service upon——

Mr. MAGOON: Well, I think that that has been proved by Mr. Brown's statement. If it has not I admit it.

Mr. ASHFORD: Will you admit 15?

Mr. MAGOON: I admit the allegations in paragraph 15 on page 8, with the exception of the statement in the protest of Mr. Ashford that the sale had been restrained. That has not been proved and I don't know whether he made that statement or not. I will admit that statement that Mr. Van Giesen was present and heard all and singular the protest and statements then and there made by your orator's said attorney, and deny that Mr. Van Giesen well knew all and singular the facts hereinbefore in this bill of complaint set forth.

Mr. ASHFORD: 16th is admitted, except as to the official character of the audience. I don't care about that; I am willing to take the admission as it stands in the answer. I ask you to admit 20.

202 Mr. MAGOON: I have no objection to the plea being introduced and I think the motion is a part of the record.

Mr. ASHFORD: 23. We refer to the *cestui que trust*, and the answer is that Mr. Van Giesen acted for himself alone. We are willing to accept that.

25. Information and belief that the defendant Van Giesen bought for the benefit of other parties, which he denies. We are willing to accept his denial.

That's all the formal proof, I think, that I will call for.

(Court adjourned until tomorrow.)

203 In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

C. B. MAILE
vs.
J. W. PRATT ET AL.

JAN. 3, 1907.

Mr. ASHFORD: I move the court for leave to further amend the bill of complaint by adding a paragraph to be numbered 15*a*, to read thus: (Reads.)

(Amendment objected to by Mr. Lightfoot. Objection overruled.)

Mr. ASHFORD: I suggest then, if your Honor please, that the amendment as written by me be attached by pasting to the margin, with a note by the clerk that the amendment was allowed.

The COURT: Yes.

H. VAN GIESEN recalled.

Mr. ASHFORD:

Q. Mr. Van Giesen, in your answer you have stated that although the property in question was bid for by you and knocked down to you as trustee, yet you have been acting solely for yourself
204 in the premises and not for any other person or persons whomsoever; is that true?

Mr. MAGOON: I object to that question. Mr. Ashford has admitted that he was acting for himself, and took the statement in the answer as being correct.

The COURT: Did Mr. Van Giesen testify that he was not acting as trustee or are you referring to his answer?

Mr. ASHFORD: I am referring to his answer. We allege in the bill (etc.). There are John Doe and Richard Roe, and I wish to dispose of them.

The COURT: I think it is proper.

A. Well, I was acting in my own individual capacity.

Mr. ASHFORD:

Q. And not as trustee for any person or persons?
A. No.

Mr. ASHFORD: Now, in view of that evidence I move to discontinue as to the defendants fictitiously named as John Doe and Richard Roe.

The COURT: Very well, Mr. Doe and Mr. Roe may be parted with.

Direct examination of C. W. ASHFORD, called and sworn.

I propose to testify concerning what occurred at the time the premises in question were exposed for sale, and what I did and said at that time and what was done and said by others.

The COURT: You were acting for Mr. Maile, I suppose?

205 A. I at that time was acting for the plaintiff Mr. Maile as his attorney and under his instructions, and, addressing my testimony particularly to paragraph 15 of the bill, I attended at the front door of Kalakaua Hale, in this city, at noon of the 5th day of July 1904, and before the sale was called I conferred with Mr. Brown, the high sheriff, in his office, to know whether it was true, the report which had been brought to me that he intended to proceed with the sale notwithstanding the restraining order that had been signed by Magistrate Lindsay on the first day of July, and which I had served upon Mr. Brown in the manner called for by the order itself. I testify specially to that service. I testify particularly that I left a copy of that order with Mr. Dow; referring now to the closing paragraph of the order, set forth on page 7 of the bill,

Mr. Dow was at that time the chief clerk in the office of the high sheriff; and I also left a copy of it at the office of Frank Andrade,—both on the first day of July 1904.

Mr. Brown in response to my inquiry stated that he did propose to proceed with the sale. I called his especial attention to the existence of the restraining order, and told him that he would be in contempt of court and that we would proceed against him for contempt of court, probably, as well as hold him otherwise responsible. He replied that he was advised that the order of the magistrate purporting to restrain and forbid the sale was an order made without authority or jurisdiction and that he was justified in ignoring it.

At 12 o'clock the sale was called or announced, Mr. James F. Morgan appearing as auctioneer, Mr. Brown, high sheriff, being present, standing in the main corridor just outside of his
206 own door. Mr. Van Giesen, present defendant, in the capacity of clerk and having a tablet of some kind in his hand upon which he appeared to be making memoranda, was there also in the front corridor, standing first just between the door leading down to the receiving station and the door leading into the deputy marshal's office, and he was there in that vicinity all of the time during the sale.

Mr. Morgan, I think it was,—possibly sheriff Brown,—read the execution, and as soon as that was done I entered a protest, stating in a loud voice within the hearing of everybody, and at the same time standing near*ing* to Van Giesen than I am sitting now and talking louder than I am talking now, that Maile, the defendant in that suit, protested against the sale upon a number of grounds, including the ground that the district court had never obtained jurisdiction of the person of Maile because of lack of legal service upon him of the summons and complaint in the original tax suit upon which the execution issued, and also upon the ground that the district court had no authority to issue the alias execution under which the high sheriff was then acting, or any alias execution; and also and particularly, laying particular stress upon the fact that the district magistrate on the first day of July then past had issued an order forbidding and restraining the sale until further order by the district court in the premises should be made, and I read that order in full, according to my best present recollection. But after I had concluded my protest Mr. Morgan made a note of it and proceeded with the sale.

There were present when the sale began I think not to exceed ten persons, and although at that time I could have named most
207 of them, still, in the lapse of time since then my memory has failed in regard to their identity, but I recall particularly that the majority of them when the sale began were attaches of the sheriff's office,—police officers, clerks, etc.

The crowd increased somewhat between that time and the time when the last parcel was struck off but there were not more than 25 at any time, and the increase of police officers and attaches was fully as great, I think, as the increase of outsiders. Cross examine.

Mr. Colburn evidently thinks there is another topic I ought to speak upon.

The COURT: Well, you may leave the stand.

(Witness leaves the witness stand and returns.)

The WITNESS: Mr. Colburn suggests what had escaped my memory for the time being, that I made some bids upon the second parcel exposed, namely the so-called Alakea street lot. Made the bids in the interest of Mr. Maile; had not gone there with the intention of making any bids, but the sacrifice of the property seemed so apparent that I determined upon the spur of the moment to make some bids, and I was raising Van Giesen's bids five or ten dollars at a time, as I now recollect, and after I had made a few of those bids, and when the Alakea street lot had run up to $300 or thereabouts, Mr. Brown, the high sheriff, interrupted the crying of the sale and announced the condition that he would require the deposit of 50% of the purchase bid upon the fall of the hammer in each instance.

The COURT: That was not announced at the opening?

A. That was not announced at the opening; no such condition had been announced at the opening nor was it mentioned in
208 the advertisement. I again protested against that and accused Mr. Brown point-blank of playing into the hands of Van Giesen and conspiring with him to secure the sacrifice of the property and the acquisition of it for a song by Van Giesen. Mr. Brown got quite warm over it and we debated the matter at considerable moment for some little time, but Mr. Brown nevertheless insisted upon the condition, and I went there without money, as I said without the intention to bid, and I could not comply with the request, though I could have complied with the conditions that were finally imposed upon Van Giesen according to the evidence as to what those conditions were, as shown by Mr. Brown and Mr. Van Giesen upon this stand, namely, have secured the money during the same day. That is all. All of these things that I have mentioned occurred in the immediate presence of Van Giesen and when he was nearer to me than he is now.

Cross-examination.

Mr. MAGOON:

Q. You were instructed by Mr. Colburn in the matter, were you not, Mr. Ashford?

A. I think immediately so, although Mr. Maile was present at some of the conferences.

Q. Yes, but you recognized Mr. Colburn as being the agent of Mr. Maile, did you not?

A. Yes.

Q. And received your direct instructions from him in the matter?

209 A. Yes, immediately, in the English language.

Q. Yes. How long before the sale should you say it was before you were instructed in the matter by Mr. Colburn?

A. Instructed as to what feature of it?

Q. As to any feature of the suit or execution.

A. My present recollection is that my first instructions were received at or about the day when I filed the first motion before Judge Dickey, and also my recollection now is, subject to amendment—I could see the copy of it there—but that particular motion was filed on the 29th of June. It was decided on the 30th of June 1904.

Q. And the sale took place when?

A. July 5th. I had been consulted in a tentative way concerning the matter, I think, as early as the 28th of June. The sale was advertised for the 28th of June, according to my present recollection, and for some reason that I do not know, unless by hearsay, was postponed until the 5th of July, a week later, and it may have been on the 28th of June that I heard that that postponement had taken place and was instructed to take what steps might be necessary. I then took time to look into the record, and particularly at the return of service, and the balance of it was my own program.

Mr. MAGOON: That's all.

The WITNESS: I wish to add, the date of my retainer—Mr. Colburn refreshes my memory now—the 25th day of June.

The COURT: Instead of the 28th?

A. Yes.

Mr. MAGOON:

Q. But you were consulted, you say, in a tentative way before that?

A. I am not sure that it was before that.

Q. What makes it come to your memory now that you were
210 retained on that day?

A. The suggestion of Mr. Colburn, and the fact that yesterday, I think it was, I looked at his accounts with Maile and saw the charge to me, although I didn't see my receipt under that date. I believe that that was the date.

Q. You saw that was the date that the retainer was paid to you?

A. That is the date it is charged in Mr. Colburn's account, and I suppose it to be correct.

Q. That is your retainer?

A. Yes.

Q. Well, it does not necessarily follow from that that you were not retained, that is, you were not engaged sometime previously, does it?

A. I knew in a general way that there was a judgment against Maile and that his property had been taken or advertised upon execution; that is to say, I had heard some suggestions of Mr. Colburn, and I presume that he spoke to me concerning what should be done in the matter. It is very common with him to talk over these matters with me in advance of any formal retainer.

Q. And it is not a fact that, in view of your relations with Mr. Colburn, when he speaks to you about a matter of that sort you consider that you are retained to represent his interests in case anything arises?

A. No, not unless I am specially—not unless there is a special retainer, particularly in a case like this where I had never had any business with Maile before. Of course with his wife I had had business, nearly ever since I got back here, concerning this property down at Kawaiahao, but for him personally I never had any business at all.

211 Q. But anyhow you have no independent recollection at this time as to the time that Mr. Colburn first engaged you to look after the matter?

A. I would say certainly not before the payment of that retainer.

Q. Well, but that is a conclusion. I am asking you what independent recollection in the matter——

A. No, no independent recollection, except this first that—the first work that I did was to proceed before Magistrate Dickey on the 29th of June.

Direct examination of ALEXANDER GARVIE, called and sworn.

Mr. ASHFORD:

Q. Mr. Garvie, you are a partner in the firm of Bishop & Co., bankers of this city?

A. Yes sir.

Q. You have been subpœnaed to produce any record existing in that bank of a promissory note given by Mr. Van Giesen to the Bank of Bishop & Co., on or about the 5th day of July 1904. Have you any such record or any such note?

A. No such record; no such note.

Q. Was there any note bearing Mr. Van Giesen's name, for the sum of $550 or thereabouts, acquired by Bishop & Co on or about that date?

A. No sir.

212 Q. Have you seen in that bank any note for that amount and dated on or about the 5th day of July 1904, with Mr. Van Giesen's name on it?

A. No sir.

Q. Do you know anything at all about the transaction?

A. No sir.

Q. Do you know anything of a transaction upon a promissory note made by Mr. Van Giesen—purporting to have been made by Mr. Van Giesen to May K. Brown, and which may have been discounted or otherwise placed at your bank?

A. We have no record of any note made by Van Giesen,—he as maker or he as endorser, but that——

Q. Made either to Bishop & Co. or to any other person?

A. No such record, with his name on it either as maker or endorser.

Q. Have you any record of any note made by Arthur M. Brown on or about the 5th day of July, 1904, for the sum of $550 or thereabouts?

A. I wish to,—your Honor I think that the bank's clients are—that is a privilege that I can't give out. I don't know if it affects the case.

Q. Well, it seems to me——

A. It is Van Giesen, I understand, that the case is about, not Mr. Brown. If I have to produce all Mr. Brown's transactions it is a privilege.

Q. That is all right; that is what the subpœna called for,—Mr. Van Giesen,—but since the subpœna was issued Mr. Van Giesen himself has been on the stand and thrown somewhat different light, a side-light, as you might say, upon the case, as to the manner in which the note was made.

Mr. ASHFORD: What I wish to show, as the court can very well observe, that Mr. Brown, the high sheriff, after acting as he
213 has been shown to have acted upon that sale, went and borrowed the money himself for Mr. Van Giesen and loaned it to him, and I wish to show that now at this time.

The WITNESS: Well, your Honor, as far as Mr. Ashford——

Mr. ASHFORD: Wait a moment.

(Argument.)

The WITNESS: Mr. Ashford, I was going to say that, while I do not admit either one way or the other, I am simply saying it is a privilege. I was subpœnaed as to Van Geisen case, not on the Brown matter.

The COURT: The fact of being subpœnaed on another matter has nothing to do with the present question.

The WITNESS: I say I do not admit either one way or another that there was such a note, simply principle.

The COURT: Do you object to the question, Mr. Magoon?

Mr. MAGOON: I think the witness himself has the right to raise the question of privilege.

The COURT: As I understand you, Mr. Garvie, you wish to raise that question and you do?

A. Yes, on a matter of principle, not on a matter which refers particularly——

Q. You contend that is your principle?

A. Yes.

Q. Not to disclose the business transactions between the bank and the clients of the bank?

A. Yes sir.

(Argument.)

The COURT: My opinion is, Mr. Garvie, based upon Mr. Wigmore, and having been also a little bit inclined that way before I consulted the authority, that it is not a privileged question. I think under that authority I am obliged to so rule; accordingly I
214 do, so then you will answer the question, Mr. Garvie.

A. What is the question, Mr. Ashford?

(Question read.)

A. Why, I didn't come prepared to—as the subpœna was simply on the Van Giesen matter I am not prepared to state accurately, but if you wish to——

Q. Well, as accurately as you can from memory, and perhaps we will not require anything more accurate.

A. You see it is two years and a half and I was not——

The COURT: Just state what you do remember on that point.

A. Well, as Mr. Ashford put it I think that we have no note, as far as my recollection goes.

Q. Or any record of any note or loan made to Mr. Brown?

A. By Mr. Brown as maker.

Mr. ASHFORD: Very well now, I will put it a little differently. Have you any record of a note for $550 or thereabouts made by May K. Brown, either with or without the endorsement of Arthur M. Brown?

A. As far as my recollection goes, possibly there is.

Q. Well——

A. But as to the particular date, what would you say by on or about that date; how far back?

Q. It may have been since that.

A. How far would that carry?

Q. Well, within a week.

A. Within a week?

Q. Yes, on the 5th day of July or within a week either way, and calling your attention particularly to the sixth day of July.

A. And outside of that time? I just ask you this.

215 Q. That is my question for the present.

A. Outside of that time if there was such a note——

Q. I do not refer to it at all.

A. Well, no, that is as far as my recollection goes.

Q. Very well then; now as far as your recollection goes have you and record of a note made by May K. Brown as promissor, with or without the endorsement of Arthur M. Brown, as of some date in the month of July, 1904, later than the 5th day of July?

Mr. MAGOON: I object to that now. That can have no probative force.

Mr. ASHFORD: As bearing on the *bona fides* or *mala fides* of Mr. Van Gieson.

Mr. MAGOON: I say it is irrelevant and improper.

Mr. ASHFORD:

Q. I will ask you what was the date, if you remember?

A. If your Honor—I could get it by telephone if you would let me do it.

Q. What is your recollection, if you have any?

A. I think it is about the 17th. You see this is all to the best of my knowledge; I haven't—I don't want to say for a minute that it is—that it is the correct information.

Q. Do you remember the amount?

A. I should think 500.

Q. 500?

A. But, as I say, that is again——

Q. Would you be quite sure that it was not 550?

A. Well, I wouldn't like to say that, but I think it was five, straight five.

Q. And as nearly as you can recall who were the parties to the note?

A. May K. Brown and A. M. Brown. I suppose that is all I have got to reply to these questions.

216 Q. And did A. M. Brown appear as promissor or endorser?

A. Endorser.

Q. And who was the payee?

A. I am not sure; probably Bishop & Co., or it might have been A. M. Brown. Your Honor, I think this evidence, if I might be permitted to make sure of it if it is going on the records? Because it is very——

The COURT: I understand how you testified,—to the best of your recollection. If the record, if it should be examined, prove differently, that doesn't show that you have falsified at all.

Mr. ASHFORD: That's all.

(No cross examination.)

Mr. ASHFORD: I will ask Mr. Van Giesen to produce that receipt that was spoken about yesterday.

I will offer this receipt.

Petitioner rests.

H. VAN GIESEN recalled.

Mr. MAGOON:

Q. Do you have any personal recollection of the service of summons in the case of Pratt as tax assessor and collector against Mr. Maile?

Mr. ASHFORD: I object to any personal recollection. We are proceeding now, if the court please, upon just what the district court proceeded upon, namely, the return of Mr. Van Giesen as the officer who made service here.

217 (Witness withdrawn temporarily.)

Direct examination of FRANK ANDRADE, called and sworn.

My name is Frank Andrade.

Mr. MAGOON:

Q. You heard what Mr. Colburn stated yesterday, Mr. Andrade, with reference to the judgment which was rendered in the district court against Mr. Maile at the suit of Mr. Pratt as collector of taxes?

A. I was not here when the judgment was in question. I came into the courtroom when the question of execution was being discussed.

Q. Well, will you please state your recollection, Mr. Andrade, of that first conversation that you had with Mr. Colburn, as far as you can remember.

Mr. ASHFORD: Now then, about what?

Mr. MAGOON: About this execution.

Mr. ASHFORD: There is no evidence anywhere that there was ever

at any time any conversation between Mr. Andrade and Mr. Colburn concerning this third execution, this so-called alias execution; absolutely none.

Mr. MAGOON: I will change the question then.

Q. With reference to any execution which was issued in the case of Pratt, tax collector, against Mr. Maile?

Mr. ASHFORD: We object to that as being incompetent,
218 irrelevant and immaterial; upon the ground that it is not responsive to any of the issues of the case; that nothing that was said between Mr. Andrade and Mr. Colburn in the matter could in anywise change either the jurisdiction of the lower court,—confer jurisdiction where it did not otherwise exist or confer upon that court the authority to issue an alias execution.

Mr. MAGOON: The point is to disprove what Mr. Colburn said yesterday upon the stand with reference to his conversation with Mr. Andrade, which conversation, as I understand, was let in over the objection of Mr. Ashford, the object being to show that Mr. Andrade, as the prosecuting attorney, was at all times ready and willing to receive from Mr. Maile any sums on account of this execution.

(Argument.)

The COURT: I think the question is correct.

The WITNESS: Now I haven't the question clearly in mind.

(Question read.)

A. Of course I am only giving you my best recollections; these things happened about two years and a half ago and I had a great many tax suits at that time; but my best recollection is that, after filing the papers in the district court and obtained judgment—I do not recollect whether Mr. Ashford represented Maile or not—anyway judgment was obtained. Then I learned that Mr. Colburn was acting for C. B. Maile. Either on my own motion or at the request of Mr. Colburn I called upon him after judgment was obtained, and I think before the first execution issued, and we conversed as to the payment of these taxes. I at no time knew that Mr. Colburn had any money which he was willing to pay over on account of this judgment.

219 The COURT: You at no time knew of it?

A. No, neither from Mr. Colburn nor from anyone else. In all of these tax cases I was receiving moneys on account; whenever the request was made to receive any money on account I would take that money and give the parties, whoever paid it, credit for the amount that they paid, and at no time, as I recollect, did Mr. Colburn offer me any amount as part payment. Mr. Colburn's conversations with me in regard to this matter were for the purpose of staying the thing for a while, wait a while; and I waited and waited until I could not wait any longer and then took out these executions.

Mr. ASHFORD: Will you excuse me just at this point? Mr. Garvie has returned to court and desires to qualify his evidence with regard to the date of that transaction, and I just ask if he be allowed

to state the date. He said that he thought it was the 17th but now he wishes to state the date definitely.

The COURT: If he wishes to make it more certain?

Mr. ASHFORD: We desire that he may.

The COURT: Perhaps you can answer right there.

A. The 7th.

Q. The 7th instead of the 17th?

A. Yes sir.

Mr. ASHFORD:

Q. And the amount?

A. 500.

Q. 500?

A. Yes.

(Mr. ANDRADE recalled.)

I had several conversations with Mr. Colburn with regard to this tax judgment and the executions. One conversation was had
220 in Mr. Colburn's office in the presence of Mrs. Maile.

Mr. MAGOON:

Q. What was that conversation as nearly as you can remember?

A. Well, that was—I was there for the purpose of trying to get this money, and conversing with Mr. Colburn. Mr. Colburn put me off; that is, by that I mean that he said I would have to wait longer or something to that effect. I couldn't repeat his words.

Q. Upon that occasion did he offer to pay you any money?

A. Not that I recall, no.

Q. If he had offered you money would you have accepted it?

Mr. ASHFORD: I object to that, the frame of mind of this gentleman.

The COURT: I think it is proper. It meets the testimony of the other side.

A. I don't recall that Mr. Colburn at any time offered to me any money as part payment of this judgment that I obtained against C. B. Maile.

Mr. MAGOON: Well, the question is, I believe, whether or not you would have accepted it if it had been offered.

A. Oh, I say I would.

Q. Any portion of it?

A. Any portion of it. I have from everybody else that was willing to pay in that way.

Mr. ASHFORD: I move that last be stricken.

The COURT: I think it shows the manner in which he was conducting the affairs of the——

Mr. MAGOON:

Q. Do you recollect specifically—I will try and call your attention specifically to a time when the proceedings under
221 an execution were stayed and the execution returned unsatisfied at the request of Mr. Colburn, on a promise on his part to pay.

Mr. ASHFORD: Well, there is the same objection, if the court please. I do not see how it affects the equities here in any way at all.

The COURT: Objection overruled.

A. When an execution was stayed?

Mr. MAGOON: Or returned unsatisfied into court at the request of Mr. Colburn on his promise to pay the amount of the judgment.

A. Well now, I can't say definitely, but I know that at one time Mr. Colburn—Mr. Colburn had some dealings with Kepoikai, who was then treasurer, and I did something of that kind at the request of Mr. Kepoikai.

Mr. ASHFORD: I have never seen that second execution, if that is what you refer to.

The WITNESS: If it was done it was done through me at the request of the treasurer, whom I considered my client at the time.

Mr. MAGOON:

Q. When Mr. Colburn failed to pay after that execution was returned unsatisfied into court, did you see him again about the matter, do you remember?

A. Well now, I saw Mr. Colburn a good many times in his office about this tax case. Mr. Colburn didn't only represent Maile but he represented a number of others, and I was there off and on during this period. I cannot state positively.

Q. Well, does it refresh your memory at all when it is
222 called to your attention that there was an actual sale?

A. I remember the sale.

Q. Yes. Now then do you know why that sale was held?

A. Because of ex——

Mr. ASHFORD: Wait a moment; the record speaks for itself.

Mr. MAGOON: I am trying to refresh witness' recollection, that's all. My idea is to show that Mr. Colburn was seen, and finally, when it was no longer supposed to be possible to get anything out of him on account of this judgment——

The COURT: That is what you mean by your question; you mean why did they go ahead?

Mr. MAGOON: Yes.

The COURT: I think the question is proper.

A. That third execution was gotten out by me because I could not get any money to satisfy that judgment from Mr. Colburn or anyone else; I was simply forced to go ahead as I thought right.

Mr. MAGOON:

Q. Do you remember whether or not, after taking out the third execution, you had any conversation with Mr. Colburn about the matter?

Mr. ASHFORD: I object.

A. No.

Mr. ASHFORD: Immaterial, irrelevant.

The COURT: After taking it out and before the so-called levy?

Mr. MAGOON: Before the sale.

The COURT: I will permit the question.

A. My best recollection is that there was some conversation as to the payment of the money, and if I recollect right the sale under that third execution was postponed once at the request of Mr. Colburn. I wouldn't say that—I wouldn't make that as a
223 positive statement.

The COURT: May have been the second execution, Mr. Andrade?

A. It may have been; I cannot tell.

Q. Well, can you say this, was there more than one postponement of the sale under any execution?

A. Now, your Honor, I couldn't—I wouldn't undertake to——

Q. All right.

A. Say.

Q. You have no recollection of but one postponement?

A. I think there was a postponement but I wouldn't say positively.

Q. Which execution it was?

A. Which execution it was.

No cross-examination.

Afternoon Session, Jan 3, 1907.

H. VAN GIESEN recalled.

(Argument on question asked witness before withdrawal from stand.)

The COURT: I feel that the witness should be permitted to state the facts as they actually existed. I might say that I base my ruling largely upon Section 89*b* of Vol. 1 Freeman on Judgments and one case that Mr. Magoon read, wherein it distinguished between return and service, that the service was actually made.

Mr. ASHFORD: I would like the stenographer's notes to
224 show my objection to this evidence, and exception.

The COURT: It may be so shown.

(Question read.)

A. I have.

Q. By whom was the process served?

A. By myself.

Q. When?

A. When?

Q. Yes.

A. Sometimes in December of 1903.

Q. I will show you the return——

Mr. ASHFORD: Perhaps you had better exhaust his memory. You are putting him on there to prove things by his memory.

The COURT: Find out all he can remember, Mr. Magoon, before you show him the document or the paper.

Mr. MAGOON: Do you deny that that is his signature? If you admit it that's all.

Mr. ASHFORD: We admit it, most assuredly.

Mr. MAGOON:

Q. Where was that service made?
A. Right down below here in the old fish market.
Q. On whom?
A. On C. B. Maile.
Q. What was done at the time of the service by you?
A. I took the copy and had the original; gave him the copy, opened the original and showed him. It has been always my custom in serving papers; and I told him in Hawaiian it was the suit against him for taxes.
Q. Have you anything else——?
A. Nothing; came back and made my return.
Q. Did you afterwards see Mr. Maile in connection with that suit or any judgment that was rendered thereon?
A. I saw Maile thereafter.
Q. Where?
A. At his home.

Q. When, with reference to the taking out of these different executions?

225 A. That was during the first execution. Once went to his place—I went to his place twice. When I went there he was not home, the first time; I met his wife and asked his wife where he is; she says he has left home.
Q. You didn't meet him there?
A. No. Second time I went up there I met Maile.
Q. What did you do then?
A. I told him that this is an execution against his property and whether he will pay the execution, the amount of the execution, or not. He told me that he hadn't got the money then but he will try and raise the money after that.
Q. Is that all that you can remember of that conversation?
A. That's all I can remember of that conversation. All the conversation was in Hawaiian.
Q. Did you have the execution with you that occasion?
A. I did; showed him the execution.
Q. Was there anything said in connection with Brown, as far as you can remember?
A. No, not at all; not by me.

Mr. MAGOON: The witness wants to speak to me. May he speak to me?
Mr. ASHFORD: Well, I don't like the idea of withdrawing the witness.
The COURT: If there is something the witness wishes to testify to?
The WITNESS: Yes, I want to call his attention to it.

Q. What is it?
A. Regarding the loan.
Q. O well, anything that you have to say about the loan, just say it right out.

226 A. I was going to say that it was not only Mr. Brown that I have tried to get a loan from. I first tried Mr. Joe Goo Kim for a loan, who was present at the sale too, giving him for security a piece of land belonging to me at Kalihi, but I didn't get any answer from him, definite answer from him, so I struck Brown.

Mr. MAGOON:

Q. Who had the conduct of the third execution or levy?

Mr. ASHFORD: One moment. The execution was issued to the high sheriff, if the court please.

The COURT: I suppose Mr. Magoon means who actually attended to it.

Mr. MAGOON: Yes, as to who attended to the publication of notice.

A. Harry Mossman attended to that work.

Q. You didn't have anything to do with that?

A. No.

Q. What was your commission in the police department at that time?

A. Yes, I was commissioned that time.

Q. As what?

A. As a police officer.

Q. Did you have any conversation with Mr. Colburn after the executions were taken out, or were you present at any conversation with him with reference to this judgment against Mr. Maile?

A. I don't think so.

Q. Did you have any other or further conversation with Mr. Maile about the matter?

A. No.

The COURT: Let's see. I understand you to say, Mr. Van Giesen, that at the time this sale was made and prior thereto you
227 were a special police officer?

A. I am.

Q. And a clerk and stenographer for the high sheriff at that time?

A. No, my specific duties are clerk, while I was commissioned a police officer.

Q. For the territory?

A. For the territory.

Q. At that time.

A. Sheriff's office.

Mr. MAGOON:

Q. Were you clerk for the sheriff?

A. Clerk for the sheriff's office.

Q. The sheriff's clerk was whom?

A. Was Mr. Dow.

Q. Well, you say clerk in his office——

A. I am clerk.

Q. In the office of the clerk of the sheriff—for the sheriff?

A. Clerk of the high sheriff—office of the high sheriff.

The COURT: Well then, as I understand, you were what might be called private secretary, is that the idea?

A. Yes, exactly.

Q. Sheriff's private secretary and stenographer?

A. Yes sir.

Mr. MAGOON:

Q. Where was your office?

A. My office was in the—one of the cells in the rear of the deputy sheriff's office; I have a little private office there.

The COURT: Well then immediately accessible to the sheriff's office, right off of his office?

A. Right in the rear of the deputy sheriff's office there
228 is a corridor going upstairs right to the rear, but there is always a bell running from the sheriff's office to my office; in case he wants me, press the bell.

Mr. ASHFORD: If I may be allowed just at this point, you were in that corridor or in one of those back rooms that used to be used for a cell?

A. Yes.

Q. And you would come right along the corridor to the back door of the sheriff's office?

A. Yes.

The COURT: And as I understand you, there was a wire running to his office?

A. Running from his office to mine.

Q. For a bell?

A. For a bell.

Mr. MAGOON: Is there anything further that you wish to say?

A. No.

Cross-examination.

Mr. ASHFORD:

Q. What is it, Mr. Van Giesen, that makes you say that you served Mr. Maile in the lower fishmarket down here, as you pointed?

A. Because you were criticising my service and the return of my service as not proper.

Q. I don't think you understood the question; I will put it a little differently. When you say you served him in the old fish-market do you mean the public, government market, makai of Halekauwila street and between Richards and Alakea street, in this city?

229 A. Yes.

Q. How do you know; what makes you sure that it was there that you served him?

A. Because I was pretty sure that I was there, because I know Mr. Maile myself personally.

Q. Yes, you know him personally, but what makes you sure that you did serve him there and that you did not serve him at his house?

A. Well, at that time I didn't know where he is living but I know he has a stall down at the market; that is the reason I went down there.

Q. Oh, he had a stall there at that time, had he?

A. Yes sir.

Q. Now are you sure of that, even?

A. I tnink I am.

The COURT: What was he doing when you went down there?

A. Selling dried fishes and salmon.

Mr. ASHFORD:

Q. You remember the fact, then, that when you went to serve him and found him and did serve him, he was at his stall in the market, selling fish?

A. I think so.

Q. Well, but do you remember? Let's see what your memory is like?

A. As I remember, that's true.

Q. What's that?

A. That is true, selling fish at the stall there when I went there and served the paper.

Q. You are speaking of dried fish. He was a dealer in salt, barreled salmon, wasn't he, and such things as that?

A. Yes.

230 Q. And you remember to have seen him there at that time, do you, conducting that business?

A. Yes.

Q. And that is what fixes it upon your memory, the fact that you did find him there, in his conducting his business, that is the way you know that it was there at the market instead of somewhere else?

A. Well, not that; because I didn't know where he is living then; I know he had a stall down there, that is the reason I went down there and found him down there.

The COURT: Well, had you been looking around town for him?

A. I inquired whether he is still down there; I got the information that he was down there and I went down there.

Mr. ASHFORD:

Q. Find him the first effort, first trip?

A. I don't know whether the first trip or second trip or third trip. On the first——

Q. You observed, perhaps, from your return, your return is that you served him the same day that it was issued.

A. Well, it might have been down there twice; I don't know.

Q. But you don't remember more than once?

A. No sir.

Q. What you do remember is that you certainly did find him there at his stall?

A. Yes sir.

Q. And when you found him he was engaged in his usual business of selling salmon and dried fish, etc.?
A. Yes sir.
Q. Do you remember in what part of the market his stall was located?
A. On the portion facing to Ewa side.
231 The COURT: Facing on Alakea street?
A. Facing on Alakea street.
Q. With reference to the makai or mauka end of the fish-market——
A. No, makai end.
Q. I mean—Was it near the makai end?
A. Makai end. Mauka end was some——
Q. And fronting on Alakea street?
A. Fronting on Alakea street.

Mr. ASHFORD:

Q. That is, I believe there are some four different tiers; one tier faced each street, and then there were two tiers facing on an avenue that ran through the market, isn't that the case?
A. Yes.
The COURT: Was his stall on the outside?
A. Outside, facing Alakea street.

Mr. ASHFORD:

Q. Do you remember anyone else who was present at the time when you made the service?
A. I don't recollect whether—who was present there also.
Q. Do you remember the time of day?
A. No, I do not.
Q. Now when you say that you remember having shown hi*n* the original, how did you show it to him?
A. Just took it out, faced it to him.
Q. What did you say to him?
A. I says, (says in Hawaiian) showing I had the copy in one hand, gave it to him, "copy ke ia—this is the copy." That has been always the custom to me.
Q. You were accustomed to serving a great many processes about that time, were you not?
A. Yes sir.
232 Q. Do you remember in every instance where you found the defendant to serve him, other defendants than this one, so long ago as that?
A. I remember some defendants that I have served, yes.
Q. Can you mention any other defendant that you served in the month of December 1903, over three years ago?
A. There is one time I went down and served a paper on his wife. It was a different suit altogether.
Q. When was that?
A. Something thereabout, 1903 or 1902; it was a horse case.
Q. Now that is one other defendant that you remember. Can you recall any other service that you made about that time? Take

some man, for instance, that you served; a woman, that might be so exceptional as to place it in your memory. Mention some other man whom you served process upon as long ago as December 7th or thereabouts, 1903?

A. Yes.

Q. Who?

A. In the tax case, to Henry Vierra, used to be over there, superintendent—assistant and superintendent, public works.

Q. Where did you find him?

A. Outside here. I was coming in this building and I met him outside and gave him a copy.

Q. You think that is as long ago as three years ago?

A. Yes, the same time this case was brought up.

Q. And do you remember how you served him?

A. The same way,—gave him a copy, showed him the original,—"This is the copy; here is the original."

Q. Do you remember whether you made the same kind of a return in his case that you made in this case?

A. I think—I simply fill up blanks—I think I did; I
233 am not certain.

Q. Now Mr. Van Gieson, if you should be convinced that Mr. Maile was not conducting business at the market at that time would it make any difference in your view, your belief, your memory, as to whether you served him with process there at that time or not?

A. I didn't quite understand.

The COURT: If you should be made to believe that he was not in business there at the fishmarket at that time at all.

A. I know it for a fact he was down there selling fish. I met him down there; can't be anything else.

Mr. ASHFORD:

Q. Well now, you have seen him many times in his stall down at the present market, have you not?

A. Yes; yes.

Q. And you have noticed the particular garb that he wears, have you,—well, a jumper like that and an apron and so forth?

A. I think something like that.

Q. Yes, an apron, you noticed him wearing an apron?

A. Yes, sometimes he wears aprons, yes.

Q. Did you notice whether he was dressed that way at the time you served him?

A. I don't recollect the way what he was dressed down there that day.

Q. All that you know is, then, that he was there in his stall, as you knew his stall to be, and apparently conducting his usual business?

A. Yes.

Mr. ASHFORD: Pau.

Mr. MAGOON: I wanted to ask, with the permission of the court: Was that in Honolulu; that you served that summons on Mr. Maile?

234 A. Honolulu, Island of Oahu, Territory of Hawaii.

The COURT: That's all, Mr. Van Giesen.
Respondents rest.

Direct examination of C. B. MAILE, recalled in rebuttal.

Mr. ASHFORD:

Q. Mr. Maile, a few preliminary questions. How many times have you been married?
A. Twice.
Q. Your first wife, is she dead?
A. Dead.
Q. Do you remember in what year she died?
A. Yes.
Q. What year?
A. 1902.
Q. Before her death and up to the time of her death what business had you been following?
A. At the market.
Q. Well, what doing; what was your business?
A. That is, dealing in salmon, dried fish.
The COURT: I understand that to be the market on Alakea St.?
A. Yes, down there.

Mr. ASHFORD:

Q. In what part of the year 1902 did your wife die?
A. This month.
Q. That is the first month of the year?
The COURT: January 1902?
A. Yes.
235 The COURT: January 1902 his wife died.
A. On the 24th.

Mr. ASHFORD:

Q. Did you continue in business down there at the market after the death of your first wife?
A. No. No, at the time of the death of my wife I quit the business.
The COURT: Well, immediately, the very day she died, or day before or next day?
A. It was two weeks after the death of my wife that I quit.
Q. So then it was in February that you quit?
A. Yes.

Mr. ASHFORD:

Q. Now you are in business again, are you not, in that same business?
A. Yes.
Q. When did you first resume business after you quit business following the death of your wife?
A. 1904.

Q. I will ask you to look at this license for the sale of salmon and state when you resumed business with reference to the date mentioned in that license?

A. That is my license, and that is—it was from that time that I commenced to do business again.

Mr. ASHFORD: I will ask to introduce this license in evidence, if the court please.

Mr. MAGOON: I object to it.

The COURT: I think it is proper.

Mr. ASHFORD:

Q. In what market did you resume business?

A. That market on King street.

Q. Did you, after you quit business two weeks after the death of your first wife, at any time or at all resume business and have a stall, or tend anyone else's stall, in what we call the makai market here by Alakea street?

236 A. No.

Q. Are we to understand then that from sometime in February 1902 until the second day of July 1904 when you got this license and started to conduct the business in the Oahu market, that you were out of business?

A. Did not.

Q. What were you doing during those two years or thereabouts,—any business at all?

A. I didn't do anything; I simply stayed at home, up and to the time that I recommenced my business according to that.

Q. And your home was where?

A. Out at Palama here.

Q. The same place where you live now?

A. Yes.

Q. Now you remarried, did you not, remarried Koolau Kaikainahaole?

A. Yes.

Q. What was the date of your marriage to her?

A. On the 11th of May 1903.

Q. And from that date until you resumed business in 1904 under this license that we have filed was she living with you as your wife?

A. Yes.

Q. Were you at any time in the month of December 1903 conducting a stall for the sale of dried fish, salmon, etc., in the makai market, Alakea street?

A. No.

Q. Were you at any time during that month, and particularly on the 7th day of that month, present in any stall where you were selling, either for yourself or any other person, dried fish, salmon, etc.?

A. No.

Q. Did you at any time receive a visit from Mr. Van Giesen in

the makai market at Alakea street, wherein he showed you any legal document whatsoever?

A. No.

237 Q. Did Mr. Van Giesen at any time, in this market makai, speak to you about a suit against you for taxes and show you any paper connected with it or said to be connected with it?

A. No.

Cross-examination.

Mr. MAGOON:

Q. Do I understand from you, Mr. Maile, that from the period at about two weeks after the death of your wife up to the time that you began the business in the new fishmarket on King street you never visited the Alakea street market?

A. I have gone there sometimes.

Q. Well, would you go there frequently or only occasionally?

A. That is, I have gone there sometimes to purchase fish; when I wanted fish I have gone down there.

Q. And did you ever assist your friends down there in the selling of fish when you went down?

A. No.

Q. Was it your present wife's business to sell fish?

A. You mean at that time?

Q. At that time, yes.

A. No.

Q. Afterwards? I am speaking down here at this market.

A. No.

Q. Do I understand that Mrs. Maile had no fish stall there herself?

A. At the old fishmarket, very old fishmarket.

The COURT: That was a good many years ago. That was before I came here.

Mr. MAGOON:

Q. Now you made a mistake, didn't you, in your testimony the other day, if your testimony is correct now, that at the time
238 you were served with the process in this case you were doing the business down at the fishmarket here?

Mr. ASHFORD: I object to that, because it is assuming something that I declare has not occurred.

The COURT: Well, if he don't seem to understand the question I will see that he understands the question.

A. Yes, I did so state. I made a mistake in that statement that I made, but when I refer to the license that I got I found that I was mistaken in that statement.

Mr. MAGOON:

Q. Then as you understood it the other day you thought that Mr. Van Giesen had served you at the old fishmarket?

Mr. ASHFORD: He didn't say that. I asked him when he was served with the process was he doing business down here at the old Alakea street fishmarket. He said yes. Now he says that he said yes. He explains that by saying that he was mistaken about it.

The COURT: Well then, where were you served by Mr. Van Giesen with this process, this paper?

A. At my home.
Q. At Palama?
A. In Palama, yes.
Mr. MAGOON: Honolulu?
A. Yes.
Q. And Island of Oahu?
A. Yes.

Q. Now then you were also mistaken, were you, Mr. Maile, the other day when you said that at the time of this levy upon you you had all the way from five to twenty barrels of salmon and doing business, is that right?

The COURT: Do you mean the service of the summons or——?

Mr. MAGOON: Service of the execution, on the 25th day of May, I believe it was, 26th day of May.

239 A. I was mistaken as to the time when I stated that I was dealing in salmon and all the way from five barrels up to twenty barrels, believing that that was the time that I was dealing in salmon at that—in those quantities, but in referring last night to my license I found that it was in the year 1904 instead of the time that I had reference to.

The COURT: Well then, as I understand you, at the time the execution was presented to you and the so-called levy was made you had no salmon then?

A. I had none.
Q. What about the calabashes?
A. O, yes, I had that.

Mr. MAGOON:

Q. Do you remember—for the purpose of fixing time this is—of having a conversation with me at the fishmarket with reference to this leasehold,—the fishmarket on Alakea street?

A. Well, my remembrance is that that conversation was had at your office.

Q. Now don't you remember that I went down to the fishmarket and you were there in the fishmarket selling dry fish, and I had a talk with you there, and then I asked you to come up afterwards to the office and see me; don't you remember that?

A. No.

Q. That is you intend to say that you had no talk with me at the fishmarket about this leasehold at all?

A. It was at your office where all the conversation took place in reference to the lease of this place.

The COURT: How did you happen to go to Mr. Magoon's office?

A. The reason of my going there was to collect rent from Mr.

Magoon who had the lease of the place, and I used to go there every month to collect that rent from him.

Mr. MAGOON:

Q. Were you ever paid the rent by me personally?

240 A. No, someone else paid me the rent.

Q. And so as a matter of fact you never did collect the rent from me?

A. Well, I believe that the person that was set apart to pay such demands as were made, on behalf of Mr. Magoon, was a lady that was in your employ.

Q. Yes.

A. And that she was there for that purpose in—transacting business in your name.

Q. Well, that is all right——

A. And of course if you didn't agree to it, why certainly I never would have got it.

Q. Yes. Now you then remember at my office of having a conversation with me with reference to the leasehold, do you?

A. Yes.

Q. Was that before or after the death of your first wife?

A. I think my wife was living then.

Q. Can you tell us about how long before she died that this conversation took place?

A. Well, that is what I say, it was during the lifetime of my wife that this conversation took place.

Q. Now isn't it a fact, Mr. Maile, that when I first spoke to you about the matter I made a proposition to you with reference to an extension of the leasehold, and made an offer of rent to you for this property, for an extended leasehold, and that was at the old fishmarket on Alakea street, and you told me that you would consider the matter and let me know, and went to my office and talked to me about the matter and said that you didn't want to make the lease; isn't that the fact?

A. No, it was at your office; it was at your office that this conversation took place.

241 Q. Well, only one conversation between us?

A. There was only one conversation pertaining to rental—to rent.

The COURT: Now you say that every time you went there you collected the money from this lady. How did you happen to see Mr. Magoon on the occasion that you now refer to if Mr. Magoon did not pay you the rent, or you had no talk with him about the rent?

A. The room in which this lady — is a separate room from Mr. Magoon's office, but this conversation that I had with Mr. Magoon was in Mr. Magoon's own office.

Q. Well, how did you happen to go in there?

A. Well, it was at one of the times that I went to get my rental that Magoon wanted to see me, and I went to his office and saw him.

Mr. MAGOON:

Q. How did you know that I wanted to see you?
A. I suppose you wanted my land.
Q. And how did you know that; what led you to believe it?
A. Well, what I know is this, that Mr. Magoon wanted my place because he already had a place in the corner which is called Magoon premises or Magoon Building, and he wanted to get my place in order that he might put up another building or another similar building to the one that he had.
Mr. MAGOON (to interpreter): "And he wanted to get a lease of it;" that is what he said.
A. That is, that was your idea.
Q. Yes, but now how did you know that I wanted that; how did you come to go to my office; what induced you to go to talk about that matter to my room?
A. It was Magoon himself.
242 Q. That is, I saw you when you went in, and then called you into my own private office, or did I see you at some other place and then ask you to come?
A. It was during one of the times that I went to collect the money. I think the word was left with this lady to tell me when I came there for me to go and to see you; that is how I got to go there.
The COURT: Did she tell you?
A. Yes.

Mr. MAGOON:

Q. And then you went in and then this proposition was made to you, wasn't it, to lease your land for the purpose of putting up a brick building, and the size of the building and everything was gone into and the term of years, and you listened to the proposition and rejected it right then and right there without any further consideration?
A. Yes, in my conversation with you you stated to me what your desires was, and the only obstacle towards coming to a definite understanding about the place was in regard to the rental; it was not sufficient, and that is the reason that I refused.

Direct examination of KOOLAU MAILE, called and sworn.

Mr. ASHFORD: Are you the wife of C. B. Maile?
A. Yes.
Q. When were you married to him?
A. In 1903.
Q. Do you remember the month and day?
A. Yes.
Q. State it.
A. On the 11th of May of that year.
243 Q. At that time where was he living?
A. At Palama.
Q. Was he engaged in any business at the time when you married him?

Mr. MAGOON: I object to that. It doesn't make any difference.
Mr. ASHFORD: It is preliminary.
The COURT: I will admit the question.

A. No.

Mr. ASHFORD:

Q. Did he engage in business afterwards?
A. Some long time afterwards.
Q. Do you know when?
A. 1904.
Q. What business did he engage in?
A. Salmon.
Q. That is, selling salmon?
A. Yes.
Q. Where?
A. At Anin's new fishmarket.
The COURT: On what street?
A. King street.

Mr. ASHFORD:

Q. Before you were married had you known of him conducting business, the same business, in the makai market here at Alakea street?

Mr. MAGOON: I object; immaterial.
(Objection sustained.)

Mr. ASHFORD:

Q. Very well now, from the time you were married, in May 1903, until 1904 when he started to sell salmon in the Anin market, was he conducting business, selling salmon and dried fish, anywhere at all between those two times?
A. No, he did not.
Q. During that time was he employed by anybody else to sell salmon at this Alekea street market?
A. No.

244 Cross-examination.

Mr. MAGOON: "I don't know" she said.
The COURT: Ask her again to be sure.
A. Did not.

Mr. MAGOON:

Q. Didn't you just now say "Aole owau ike?"
A. That is he did not deal in salmon at that time.
Q. But didn't you just now say that,—"Aole owau ike;" didn't you say that in response to Mr. Ashford?
A. That is, I didn't see him deal in salmon at that time.
Mr. MAGOON: That's all.
The COURT: She used it in the sense of see, or didn't know; "I didn't know of him doing so," isn't that what it means?
The INTERPRETER: You can use it in that way.

I hereby certify the foregoing to be a complete and accurate transcript of my shorthand notes of the proceedings had and testimony taken in the above entitled cause.

J. L. HORNER,
Official Reporter.

Rec'd & Filed Feb. 9 1907 at — o'clock — M.
J. A. THOMPSON, *Clerk.*

245 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

C. B. MAILE
v.
JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii, and H. VAN GIESON, Trustee.

Appeal from Circuit Judge, First Circuit.

Argued April 1, 2, 1907; Decided April 20, 1907.

Frear, C. J., Hartwell and Wilder, JJ.

Equity—execution sale of land set aside, when.—An execution sale of land pending an order by a district magistrate restraining the sale, whether the order be authorized by law or not, will be set aside in equity when grossly inadequate prices were obtained.

Practice—service of district court summons—levy of execution against real property—tax suits—appointment of new collector of taxes between judgment and execution—non-averment that money sued for is for use of Territory—alias execution.—A district court summons is properly served by delivery of a true copy to the defendant. A writ of execution is levied upon real property by posting the officer's notice of sale describing the property in three conspicuous places within the district, publishing it in a Honolulu daily newspaper during thirty days prior to sale and posting the notice upon the premises. In a suit for taxes no revivor is required upon the appointment of a new tax assessor and col-
246 lector between judgment and execution. It is unnecessary to aver in such suits that the money sued for is for the use of the Territory—a second execution may be issued on a judgment for taxes within one year after return of preceding execution.

Sheriff's sale to a subordinate—requiring cash deposit on bids by judgment debtor.—Repeated promises of the judgment debtor to pay the judgment not having been kept the high sheriff was justified in requiring his bids at the execution sale to be accompanied by a cash deposit. A sale to the high sheriff's confidential clerk is not illegal as it does not appear that there was fraudulent collusion between them.

Opinion of the Court by HARTWELL, *J.*:

The plaintiff appeals from a decree dismissing his bill to set aside an execution sale of three parcels of his land valued at about $11,760 which were sold by the high sheriff July 5, 1904, to the defendant Van Gieson for sums aggregating $535. The facts material to the case which are averred in the bill and either admitted in the answer or which we find from the evidence are as follows:

The defendant Pratt, when assessor and collector of taxes, brought an action "in his official capacity" December 7, 1903, against the plaintiff in the district court of Honolulu to recover $488.60 taxes for the years 1900, 1901 and 1902. The summons, which included a statement of the claim, was issued the same day returnable December 11 and was served that day upon the plaintiff by the officer delivering to him a true copy. The plaintiff not appearing
247 the district magistrate on December 18 adjudged him to be in default and rendered judgment against him for $540.11, the sum claimed, with the statutory penalty and costs, upon which judgment execution was issued December 19 against the personal property of the plaintiff and returned unsatisfied January 7, 1904, the officer's return setting forth that he had "Executed the within writ by making a due and diligent search within the judicial district of Honolulu, Island of Oahu, Territory of Hawaii, for personal property belonging to the within named C. B. Maile and subject to execution and no such property can be found within said judicial district." Thereafter another execution, the date of which does not appear, was issued directing levy upon the plaintiff's personal property "and if sufficient cannot be found then upon his real property" and to sell the same or so much thereof as should be necessary to satisfy the judgment. Pursuant to the second writ certain real property of the plaintiff was advertised for sale but the execution was withdrawn upon the promise of John F. Colburn, the plaintiff's agent, that he would settle. The promise not being kept a third execution similar to the second was issued May 25, 1904, the defendant Pratt having meanwhile been succeeded by James L. Holt as assessor and collector. Before anything was done upon the third execution the plaintiff expressed to the high sheriff his surprise that his agent had not paid the judgment, saying that the money to pay it was in the agent's hands and that he desired its payment. The judgment not being paid, however, the property was advertised for sale on June 27, 1904, at noon, at which time, at the request of the agent, the sale was continued until July 5. The levy was made by posting the high sheriff's notice of it describing the property to be sold in three conspicuous places within the district and publishing it in a Honolulu daily news-
248 paper during thirty days prior to the time appointed. According to the usual course the notice would have been posted on the premises and it may be inferred although it does not appear that this was done in this instance. June 30 the plaintiff moved the district court to recall the third, or, as it is termed, alias execution on the ground that the court had no obtained jurisdiction of his per-on by service of the summons above shown;

that the action was irregularly brought in the name of Pratt without averring that the money sued for was for the use of the Territory; that at the date of the alias execution Pratt was not collector and that the high sheriff had levied upon the realty without levy upon or search for personal property, which motion the magistrate denied. July 1, a new magistrate being in office, the plaintiff moved that the service of summons be quashed because not made as provided by law and for a temporary restraining order forbidding the sale under the alias execution, upon which motion the magistrate made an order that the high sheriff refrain from selling until further order of the court and set July 6 for hearing the motion, requiring service of the order to be made upon the high sheriff and the attorney for Pratt, which service was made as ordered. At the sale July 5, which was made notwithstanding the order, the plaintiff's attorney protested against it on the grounds that the judgment was void because the district court had not jurisdiction of his person and because the sale was forbidden by the magistrate and announced that no purchaser could obtain a valid title and that the plaintiff would resist claim of title of any purchaser, the defendant Van Gieson who was the high sheriff's office clerk and the officer who had indorsed the return of service on the summons being present and within hearing distance. While bidding upon the second parcel was in progress the high sheriff announced
249 that he should insist upon deposit upon fall of the hammer for each parcel then unsold of fifty per cent. of the purchase money, a condition not contained in the notice of sale and not enforced against Van Gieson, the high sheriff after the sale going with him to the bank and obtaining the money there. July 6 the plaintiff moved the magistrate to set aside the sale upon the grounds mentioned in his motion of June 30 to stay it. Both motions were denied August 15.

The prices obtained at the sale were exceedingly disproportionate to the value of the land.

The plaintiff's motions were properly denied. There was no defect in the service as the statute does not require that in district court cases a certified copy of summons be served or that the original be either read or shown. If the service had been defective the plaintiff's appearances in his motions were not special appearances for the sole purpose of objecting to defective process or to the jurisdiction of the court over his person and would properly — been held to be general appearances waiving defects and irregularities in service of process. An objection to jurisdiction over the person cannot be submitted at the same time with an objection to the jurisdiction over the subject matter. See *Fitzgerald v. Fitzgerald*, 137 U. S. 106. If the plaintiff had any defense on the merits he should have moved to set aside the default and vacate the judgment in order to enable him to present it, but apparently he had none. He allowed the time for a writ of error to elapse and then relied on one motion after another, based upon no tenable grounds for delaying payment of the judgment.

The execution against the personal property only was authorized by the statute providing in cases of suits for taxes that "execution

may issue upon any judgment rendered in any such suit which may be satisfied out of any real or personal property of the
250 defendant in any such suit, without other or further authority." Sec. 1269 R. L. The alias execution, issued "within one year after the return day of that which preceded it," was authorized by Secs. 1807 and 1809 R. L.

The plaintiff had been informed of the amount of the judgment and his agent had agreed to pay it the second execution having therefore been withdrawn. He was notified by the high sheriff's notice of sale, posted upon his premises, that they were proposed to be sold upon execution. The levy was sufficiently made by advertising in the newspapers and by posting the notices in public places and upon the premises. It was unnecessary to aver in the complaint, which was included in the summons in the form of a statement of the claim, that the money sued for was for the use of the Territory. Actions for taxes may be brought by the assessor "in his own name on behalf of the Territory." Sec. 1269 R. L. The appointment of the new assessor and collector, made after the first and before the third execution, did not require that proceedings be revived in the name of the new officer. "The successor of any assessor or deputy assessor shall be invested with the same powers and be subject to the same duties and liabilities as his predecessor, and shall collect all taxes then unpaid, and shall carry on any proceedings commenced by his predecessor." Sec. 1193 R. L.

The broken promises to pay the judgment justified the high sheriff in refusing to take the plaintiff's bids unaccompanied by a cash deposit. The sale to the subordinate by the high sheriff was not illegal and does not appear to have been the result of fraudulent collusion between them. It is unnecessary to decide whether a magistrate can stay execution in a case in which he would be authorized to set aside his judgment in order to avoid injustice. He entertained the motion to do this and ordered the sale to be
251 postponed until a day set for its hearing. The order should have been obeyed. The necessary result of selling in disobedience of the order was to deter persons from bidding. There was no reason why the sale should not have been postponed as previously had been done at the plaintiff's request.

The grossly inadequate prices brought at the sale are claimed by the plaintiff in his bill to have been the result of the protests of his representative and upon this view it might be necessary to hold that he cannot be relieved from consequences which he brought upon himself. But whether the protest had been made or not the result of deterring persons from bidding would have followed unless, indeed, the high sheriff had improperly withheld the information concerning the order forbidding the sale which was a material fact which in good faith ought to have been made known to intending bidders. Undoubtedly it was the existence of the order which made the sale disastrous. The maxim applies *actus curiæ neminem gravabit*, no one should suffer for the act of the court not induced by his own fraud, deceit or other misconduct. The plaintiff's course prior to the sale was not such as to entitle him to considera-

tion in a court of equity. It caused needless expense not only to himself but to the defendants and the Territory. Such practice is not to be encouraged, but orders must be obeyed unless the clearest reasons be shown for disobeying them.

The consequence of making the sale in defiance of the order and obtaining grossly inadequate prices is that the sale must be set aside and a reconveyance ordered upon the plaintiff within five days paying into court a sum equivalent to the unsatisfied balance of the judgment and the purchase money with interest and costs of court, upon which payment the decree appealed from will be reversed, otherwise it will stand affirmed.

(Sgd.) W. F. FREAR.
(Sgd.) ALFRED S. HARTWELL.
(Sgd.) A. A. WILDER.

C. W. Ashford and S. H. Derby (C. Creighton also on the brief) for plaintiff.

Magoon & Lightfoot for defendants.

252 Endorsed: Supreme Court Territory of Hawaii. October Term, 1906. C. B. Maile *vs.* James W. Pratt, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii and H. Van Gieson, Trustee. Opinion. Filed April 20, 1907. J. A. Thompson, Clerk.

253 In the Supreme Court of the Territory of Hawaii.

C. B. MAILE, Plaintiff-Appellant,
vs.
JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii, H. VAN GIESON, Trustee, Defendant-Appellees.

Notice of Presentation of Decree.

To Messrs. Magoon and Lightfoot, attorneys for the defendant H. Van Gieson, Trustee:

Please take notice that we shall present the accompanying decree to the Supreme Court of the Territory of Hawaii for allowance on the 24th day of April 1907, at 10 o'clock a. m. or as soon thereafter as counsel may be heard.

Dated, April 22, 1907.

(Sgd.) C. W. ASHFORD
(Per S. H. D.),
(Sgd.) S. H. DERBY,
Attorneys for Plaintiff.

Endorsed: No. —. Supreme Court Territory of Hawaii. C. B. Maile *vs.* James W. Pratt *et al.* Notice of Presentation of Decree. Filed April 22, 1907, at 2:10 P. M. J. A. Thompson, Clerk. Kinney, McClanahan & Derby 303-305 Judd Bldg. Honolulu, Attorneys for —— —— (Office No. —).

254 In the Supreme Court of the Territory of Hawaii.

C. B. MAILE, Plaintiff-Appellant,

vs.

JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii; H. VAN GIESEN, Trustee, Defendant-Appellees.

Decree.

The above entitled cause having come duly on to be heard before this court and argument having been had on both sides and the court by its decision rendered on the 20th day of April 1907 having dicided that upon the payment into court by the plaintiff within 5 days of the unsatisfied balance of the judgment against the plaintiff in the District Court of Honolulu dated December 18, 1903, together with interest; the payment by the plaintiff to the defendant H. Van Giesen Trustee, of the amount paid by him for the property involved in the above cause, together with interest, and the payment of the costs herein, the decree made herein by the First Judge of the Circuit Court of the First Circuit should be reversed and that the defendant H. Van Giesen Trustee, should reconvey to the plaintiff herein the properties involved in the above cause, and it further appearing that the plaintiff herein has paid into court all of said amounts.

Now therefore it is hereby ordered and decreed that the decree of the Honorable J. T. De Bolt, First Judge of the Circuit Court of the First Circuit dated January 10th 1907 be and the same
255 hereby is reversed and set aside.

And it is further ordered and decreed that the sale by the High Sheriff of the Territory of Hawaii of the properties hereinafter described, held July 5th, 1904, is hereby set aside; and that the defendant H. Van Giesen Trustee, upon tender to him by the Clerk of the purchase money and interest, to wit the sum of $646.40, to deliver to the plaintiff his Deed reconveying to the plaintiff all the properties in question in the above cause purchased by him on July 5, 1904, at Sheriff's sale, said properties being more particularly described as follows:—

First. All those premises on the makai side of Pauahi Street, Honolulu, containing an area of 2241 square feet, being a portion of Royal Patent 226, Land Commission Award 783, and conveyed to C. B. Maile by W. C. Achi as of record in the Registry Office in said Honolulu in Liber 167 page 163.

Second. All those premises on Alakea Street, Honolulu, between Merchant and King Streets, about 43 x 52 feet, conveyed to Maile by Kaluhu and Kapepehi by deed dated June 1st, 1897, as of record in said office in Liber 58 page 341. Said premises being under lease to Chang See for 15 years from November 1st 1895, at $204 per year.

Third. All those premises at Kawaiiki and Keoneula, Honolulu, described in Royal Patent 2460 conveyed to C. B. Maile by deed

of L. Kamakaponiponi and husband, as of record in said office in Liber 177 page 489 and containing 1 2-100 acres.

Dated Honolulu, April 25th, 1907.

By the Court:

[SEAL.] (Sgd.) J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii.

Endorsed: In the Supreme Court of the Territory of Hawaii. C. B. Maile *v.* James W. Pratt, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii, H. Van Giesen, Trustee. Decree. Filed April 25, 1907, at 10:2 A. M. J. A. Thompson, Clerk. C. W. Ashford, A. S. Derby and Charles Creighton, Attorneys for plaintiff.

256 In the Supreme Court of the Territory of Hawaii.

C. B. MAILE, Plaintiff-Appellant,

vs.

JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii; H. VAN GIESON, Trustee, Defendant-Appellees.

Petition for Rehearing.

Now comes H. Van Gieson, appellee above named by his attorneys Magoon & Lightfoot and moves this Honorable Court for a re-hearing of this cause on the following grounds:

First. The Court in deciding that it was the order made by the District Magistrate which made the sale disastrous, overlooked the averment of the appellant in his bill that the inadequacy of price was caused *especially* by the statement that Maile had never been subjected to the jurisdiction of the District Court.

Second. The Court in deciding that this Injunction or Restraining order issued by District Magistrate Lindsay should have been obeyed overlooked the authorities cited by appellee on page 29 of the brief to the effect that an order made by a Justice of the Peace on a matter not within his jurisdiction is void, and may be treated as a nullity.

Third. The Court in deciding that "The maxim applies *'cursus curiæ neminem gravabit'* overlooked the fact that this maxim would apply with greater force to the plaintiff in the action for tax-

Fourth. The court has decided that "plaintiff's course,
257 prior to the sale, was not such as to entitle him to consideration in a court of equity;" and the court has further decided that "the sale to the subordinate by the High Sheriff was not illegal and does not appear to have been the result of fraudulent collusion between them;" but the court has failed to consider the authorities cited in the brief of appellee and the contention urged in the oral argument that the decision of the court below should be sustained

by reason of the fact that Maile is not entitled to equitable consideration.

Dated, Honolulu, April 26, 1907.

(Sgd.) MAGOON & LIGHTFOOT,
Attorneys for Appellee.

CITY OF HONOLULU,
County of Oahu, Territory of Hawaii, ss:

Now comes J. Lightfoot and being duly sworn on oath deposes and says that he is one of the attorneys for the appellee in the above entitled cause, that he has read the foregoing petition for a re-hearing and knows the contents thereof and that the matters and things therein set forth are true to the best of his information and belief.

(Sgd.) J. LIGHTFOOT.

Subscribed and sworn to before me this 26th day of April, 1907.

(Sgd.) F. W. WUNDENBERG,
[NOTARIAL SEAL.] *Notary Public, Dist. of Honolulu.*

Service of copy of the within is hereby admitted this 26th day of April, 1907.

(Sgd.) C. W. ASHFORD,
Attorneys for Pl'ff.

Endorsed: Supreme Court Territory of Hawaii. C. B. Maile *vs.* James W. Pratt, *et al.* Petition for rehearing. Filed April 26, 1907, at 9:45 o'clock A. M. J. A. Thompson, Clerk. Magoon & Lightfoot Magoon Building Honolulu Attorneys for appellee.

258 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

Clerk's Minutes.

MONDAY, *March* 18, 1907.

Court convened at 10 o'clock A. M.
Present on the Bench: Hon. A. A. Wilder, J.

S. C. No. 203.

P. [illegible]0.

C. B. MAILE
vs.
JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division, and H. VAN GIESON.

Appeal from Circuit Judge, First Circuit.

Immediately after Justice Wilder had taken his seat he stated to counsel present that Chief Justice Frear is ill and will not be down and that all pending cases shall go over and orders the Court to adjourn until Wednesday, March 20.

J. A. Magoon, Esq., being present in Court rises and suggests to the Court that the case of Maile *v.* Van Gieson be set for Thursday, stating further that Mr. Ashford is engaged in the Peacock case and will be disengaged Thursday, suggesting also that there are many attorneys in the case.

Justice Wilder here remarked that he does not know whether the Chief Justice will be down on Wednesday.

Mr. Magoon again asks that the case be specially set for next Thursday.

Justice Wilder remarked that the matter can come up again on next Wednesday morning.

At 10:4 A. M. the Court adjourns until 10 o'clock next Wednesday morning, March 20.

(Sgd.) J. A. THOMPSON,
Clerk Supreme Court.

259 WEDNESDAY, *March* 20, 1907.

Court convened at 10 o'clock A. M.
Present on the Bench: Hon. A. A. Wilder, J.
P. 190.

C. B. MAILE
vs.
JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division, and H. VAN GIESON.

Appeal from Circuit Judge, First Circuit.

Immediately after Justice Wilder had taken his seat, he stated to counsel present that the Chief Justice is still ill and consequently all matters in order this morning will be continued until Friday.

S. H. Derby, Esq., being present in Court asks that the case of Maile *v.* Pratt be started on Friday for the reason that Mr. Ashford will be engaged to go to trial in a case before Judge De Bolt on next Monday, further stated that if the case is not ready this week he would now give notice of a motion for a continuance.

Justice Wilder stated that the matter pass until the Chief Justice is down.

At 10:3 A. M. the Court adjourns until 10 o'clock next Friday morning, March 22.

(Sgd.) J. A. THOMPSON,
Clerk Supreme Court.

260 FRIDAY, *March* 22, 1907.

Court convened at 10 o'clock A. M.
Present on the Bench: Hon. A. A. Wilder, J.
P. 191.

C. B. MAILE
vs.
JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division, and H. VAN GIESON.

Appeal from Circuit Judge, First Circuit.

Immediately after Justice Wilder had taken his seat he addressed counsel present in words as follows: "The Court did not intend to take up any work this morning, though the Chief Justice is down he is not prepared to do any work and all matters will have to go over until next Monday."

Mr. Ashford being present in Court rises and addresses the Court stating, "that a jury case in which he is concerned has been continued until Monday owing to the illness of the plaintiff Mr. Peacock; that as Mr. Magoon also is ill and being one of the counsel in the case of Maile *v.* Pratt and by telephone with him this morning he desired that that might stand for a week; Mr. Derby has engagement who is also with me in the case and would like to attend the argument, I therefore suggest in order to meet the convenience of counsel generally that neither of these cases, Maile *v.* Pratt and Porter *v.* Kapiolani Estate be not begun before Thursday of next week, I am alone in the Kapiolani Estate case."

In reply to a question by Justice Wilder, Mr. Derby stated that there is a suggestion of the disqualification of His Honor Justice Wilder in the case of Maile *v.* Pratt.

261 Mr. Justice WILDER: I would suggest that the cases be passed until next Monday when the full court is here.

Mr. Lightfoot being also present in Court stated that he had no objection to the suggestions made by Mr. Ashford.

Mr. Justice Wilder states that he would not care to set the matter himself, and as the matter comes up on Monday it can be set then.

(Sgd.) J. A. THOMPSON,
Clerk Supreme Court.

MONDAY, *March* 25, 1907.

Court convened at Ten o'clock A. M.

Present on the Bench: Hon. W. F. Frear, C. J.; Hon. Alfred S. Hartwell and Hon. A. A. Wilder, JJ.

P. 192.

C. B. MAILE

vs.

JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division, and H. VAN GIESON.

Appeal from Circuit Judge, First Circuit.

Appearances.

S. H. Derby for the Complainant-Appellant.

J. Lightfoot of the firm of Magoon & Lightfoot for the Respondents-Appellees.

On call of the above entitled cause, Mr. Derby one of the counsel representing the complainant, rose and addresses the Court as follows: "If the Court please, in the case of Maile *v.* Pratt, the plaintiff was ready to go ahead last week, each time it came up we were ready and we stated we would be engaged on Monday; Ash-
262 ford has a jury case before a jury, case before De Bolt, he (Ashford) thinks he will be through Wednesday, both sides *is* agreeable to have this case continued until Monday of next week; Mr. Ashford is the main counsel in this case, he was ready last week when it was called and was unable to be heard, owing to the illness of your Honor."

At the conclusion of Mr. Derby's remarks Mr. Lightfoot rose and addressed the Court as follows: "May it please the Court, we are ready and have been ready; Mr. Magoon is ill and will not be down today and—doubtful if he will be down tomorrow, can't be sure when he will be able to get to work; I expect to be engaged in the trial of a criminal case on Wednesday morning, I know the Supreme Court has precedence, it is a case involving the detention of the ship Claverdon about to sail and it will be a hardship. In view of that fact and in view of the fact of the illness of Mr. Magoon, I suggest that next Monday will be better time to go on with the case.

The Court here suggested Thursday.

Mr. Lightfoot again rose and states that if the case is set for Thursday they shall have to be ready, and here Mr. Lightfoot questioned the Court whether there will be any session of the Court on Friday being Good Friday.

Mr. Derby again rose and stated to the Court that he will be engaged on Thursday in an argument before the Federal Court.

The Court orders the case set for next Monday, April 1.

Following the above proceedings, the Chief Justice remarked relative to a suggestion by complainant as to the disqualification of Justice Wilder.

Mr. Derby replied that there is such a suggestion on file and that he is ready to argue that now.

On a question by Chief Justice Frear as to the grounds of disqualification, Mr. Derby replied as follows: "Justice Wilder
263 was counsel for the defendant Van Gieson in the lower Court when he argued the demurrer, that the points raised by the demurrer are now before this Court on appeal. We understand that a ruling has already been made on that matter but we wish to preserve our rights; we submit on our affidavit and suggestion that it is improper for Judge Wilder to sit in this case and not fair to the plaintiff, he having taken the view diametrically opposed to our view.

Here Justice Wilder remarked that the Judge of the lower Court overruled his views.

Mr. Lightfoot representing the defendants rose and stated that he would submit the question to the Court.

After a consultation of the Justices on the bench, the Court ruled that Justice Wilder can preside and hear the case, the Court further stated that it will so hold until it is overruled.

Mr. Derby again arose and addressing the Court stated as follows: "I am aware that no exception is allowed in this Court, if that is the ruling of the Court, I wish to note an exception to the ruling of the Court, we wish to save our rights on the records in this case.

(Sgd.) J. A. THOMPSON,
Clerk Supreme Court.

MONDAY, *April* 1, 1907.

April Session, 1907.

P. 197.

Court convened at Ten o'clock A. M.

Present on the Bench: Hon. W. F. Frear, C. J.; Hon. Alfred S. Hartwell and Hon. A. A. Wilder, JJ.

264 P. 199.

C. B. MAILE
vs.
JAMES W. PRATT, Tax Assessor, and H. VAN GIESON.

Appeal from Circuit Judge, First Circuit.

Hearing.

Appearances.

C. W. Ashford, S. H. Derby and C. Creighton for Petitioner-Appellant.

J. A. Magoon and J. Lightfoot for Defendants-Appellees.

On call of the above entitled cause, Mr. Magoon rose and asked the Court that three (3) hours be allowed each side in the argument therein.

The Court ruled that it thinks that counsel start out with the supposition that argument will be for two hours with the privilege of asking for an extension of time.

Following the above proceedings, Mr. Ashford one of the attorneys for the petitioner-appellant herein at 10:7 A. M. rose and opened to the Court stating the case and then followed with his argument continuing until 10:58 A. M., at which time Mr. Derby commenced with his argument concluding at 11:46 A. M.

At 11:46 A. M. Mr. Lightfoot one of the attorneys for the defendants commences with his argument continuing until 12 noon and before recess was taken Mr. Derby suggested that opposing counsel complete their argument this afternoon so as to give him (Derby) time to reply, for the reason that he has to appear before the Federal Court tomorrow morning.

At 12:2 P. M. the Court takes a recess until 2 P. M. this day.

265 Afternoon Session.

Court again convened at 2 o'clock P. M.

Present on the Bench: Hon. W. F. Frear, C. J.; Hon. Alfred S. Hartwell and Hon. A. A. Wilder, JJ.

Pp. 199 & 200.

C. B. MAILE

vs.

JAMES W. PRATT, Tax Assessor, and HENRY VAN GIESON.

Appeal from Circuit Judge, First Circuit.

Hearing Resumed.

Same counsel present.

Immediately after the Justices took their seats, Chief Justice Frear remarked that counsel for the appellees complete their argument in two hours.

Mr. Derby rose and stated that he did not desire to be discourteous to opposing counsel when he made the remark before the Court took the recess at noon.

The Court here suggested to counsel for the appellees to reply only to the points brought out by counsel for the appellant in their argument.

At 2:5 P. M. Mr. Lightfoot rose and resumed his argument concluding at 3:30 P. M. followed by Mr. Magoon who continues until the expiration of his allotted time (at 3:45 P. M.) at which time he asked for further time to argue.

Mr. Derby rising stated that he is willing to give Mr. Magoon further time to argue and Mr. Ashford to make a reply argument tomorrow morning.

The Court grants Mr. Magoon further time until 4 o'clock.

266 Mr. Magoon again rose and asked for a longer time.

The Court here asked Mr. Magoon to proceed.

At 3:47 P. M. Mr. Magoon resumed his argument continuing until 4 P. M. at which time he again asked for fifteen minutes longer to complete his argument.

The Court grants Mr. Magoon's request to resume tomorrow morning.

Following the above proceedings and before adjournment, Mr. Justice Hartwell asked Mr. Ashford what reply he had to make as to reimbursing or paying the judgment.

Mr. Ashford stated that he will answer that in the morning.

The Court ordered the hearing to resume tomorrow morning.

At 4:2 P. M. the Court adjourns until 10 o'clock tomorrow morning, April 2.

(Sgd.) J. A. THOMPSON,
Clerk Supreme Court.

TUESDAY, *April* 2, 1907.

Court convened at 10 o'clock A. M.

Present on the Bench: Hon. W. F. Frear, C. J.; Hon. Alfred S. Hartwell and Hon. A. A. Wilder, JJ.

P. 200.

C. B. MAILE
vs.
JAMES W. PRATT, Tax Assessor, ET AL*t.*

Appeal from Circuit Judge, First Circuit.

Hearing Resumed.

Appearances.

C. W. Ashford and Chas. Creighton for Petitioner-Appellant.
Magoon & Lightfoot for Respondents-Appellees.

267 After the Justices had taken their seats, Mr. Ashford rose and addressed the Court in response to a question propounded by the Court voiced by Mr. Justice Hartwell before it rose yesterday Mr. Ashford said: "I will pay into the Court, into the Clerk of the Court before noon today the sum of Six Hundred and Fifty Nine and 97/100 ($659.97) Dollars, being the amount of the judgment in Pratt, Tax Assessor *v.* Maile, together with legal interest to the 25th day of the present month to be held by the Clerk subject to such order as the Court may make herein. We further tender such other and further sums as the Court may deem equitable for us to pay in the matter over and above this amount. The coin will be deposited in Court."

Following Mr. Ashford's remarks at 10:2 A. M. Mr. Magoon resumed with his argument concluding at 10:18 A. M.

At 10:18 A. M. Mr. Ashford commences with his reply argument concluding at 10:26 A. M.

Case submitted and taken under advisement.

(Sgd.) J. A. THOMPSON,
Clerk Supreme Court.

SATURDAY, *April* 20, 1907.

P. 210. Court convened at 10:5 o'clock A. M.

Present on the Bench: Hon. W. F. Frear, C. J.; Hon. Alfred S. Hartwell and Hon. A. A. Wilder, JJ.

P. 211.

C. B. MAILE
vs.
JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division, Territory of Hawaii, and H. VAN GIESON.

Appeal from Circuit Judge, First Circuit.

The Court this day hands down its written opinion in the above entitled cause, the concluding statement of the Court in
268 said opinion being in words as follows: "The consequence of making the sale in defiance of the order and obtaining grossly inadequate prices is that the sale must be set aside and a reconveyance ordered upon the plaintiff within five days paying into court a sum equivalent to the unsatisfied balance of the judgment and the purchase money with interest and costs of court, upon which payment the decree appealed from will be reversed, otherwise it will stand affirmed."

(Sgd.) J. A. THOMPSON,
Clerk Supreme Court.

WEDNESDAY, *April* 24, 1907.

Court convened at 10:25 A. M.

The Court having heretofore, to-wit, on Monday April 22, 1907 adjourned until 10 o'clock A. M. Thursday April 25, it met informally this day at the desire of counsel.

Present on the Bench: Hon. W. F. Frear, C. J.; Hon. Alfred S. Hartwell and Hon. A. A. Wilder, JJ.

P. 211 & 212.

C. B. MAILE
vs.
JAS. W. PRATT, Assessor of Taxes, etc. ET AL*t*.

Appeal from Circuit Judge, First Circuit.

Presentation of Decree by Plaintiff.

Appearances.

C. W. Ashford and S. H. Derby for Plaintiff.
J. Lightfoot of the firm of Magoon & Lightfoot for Defendants.

Immediately after the Justices had taken their seats, Mr.
269 Ashford one of the attorneys for the plaintiff rose and stated to the Court that they had prepared a form of a decree in the

above entitled cause embodying the suggestions made yesterday by Justice Hartwell and that he (Ashford) had handed to the Chief Justice the decree as amended and also handed a copy to Mr. Lightfoot.

Following Mr. Ashford's remarks, Mr. Lightfoot rising offered objections to the form of the decree stating that he sees no difference between the decree as amended and the one presented to him yesterday or the day before and urges that the decree should be in the language of the decision.

During the consideration by the Justices of the objections interposed by Mr. Lightfoot to the decree, Mr. Lightfoot rose and asked that he be heard on the question as to whether Van Gieson should be allowed a fee, which request was granted by the Court, and at the conclusion of Mr. Lightfoot's remarks and argument, the Court ruled that counsel fee should not be included in the decree, the Court also ruled that the objections made to the decree are not well taken.

Mr. Justice Hartwell here asked counsel for plaintiff if a form of the deed had been prepared and presented, to which Mr. Ashford replied in the affirmative, stating also that he had handed it to the Chief Justice yesterday with the decree.

(Deed exhibited to Mr. Justice Hartwell.)

Mr. Lightfoot here stated that he would object to Mrs. Van Gieson joining or signing the deed for the reason that she was not a party to the suit and has not been made a party to the suit, and in concluding Mr. Lightfoot stated that they will move for a rehearing.

Here Chief Justice Frear asked Mr. Ashford if there was any objection to eliminating from the deed the release by Mrs. Van Gieson, to which Mr. Ashford replied in the negative and stated
270 further that they would prepare a proper deed.

Following the above proceedings Mr. Ashford called the attention of the Court to the amount in the decree as presented to be $645.80, and the amount as computed by the Clerk to be $646.40. Mr. Ashford also raised the question whether statutory attorneys' fees are part of court costs, and stated that they have this morning made an additional tender of $22.50 to cover such fees in the lower court.

The Court in reply to the question propounded by Mr. Ashford relative to attorneys' costs stated, that although attorneys' fees are not strictly part of the costs of court it would suggest that counsel pay them, and in conclusion the court stated that upon the figure in the decree being changed the formal order allowing the decree will be made tomorrow morning to which time the Court had adjourned.

(Sgd.) J. A. THOMPSON,
Clerk Supreme Court.

THURSDAY, *April* 25, 1907.

Pursuant to adjournment the Court convened at 10 o'clock A. M. this day.

Present on the Bench: Hon. W. F. Frear, C. J.

P. 213.

C. B. MAILE
vs.
JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division, and H. VAN GIESON.

Appeal from Circuit Judge, First Circuit.

Appearance.

J. Lightfoot of the firm of Magoon & Lightfoot for Defendants.

271 After Chief Justice Frear had handed down the written opinion of the Court in the case of S. M. Damon *et al. v.* Honolulu Plantation Co., he (Frear, C. J.) asked the Clerk if the decree had been properly changed, to which the Clerk replied that the only change was as to the amount payable to Mr. Van Gieson, to wit, $646.40, which change had been made in the decree.

In reply to a question by the Chief Justice directed to Mr. Lightfoot as to whether there were any additional objections to the decree, stated as follows:

Mr. LIGHTFOOT (Rising): We wish to have it appear of record that we object to the form of the decree.

FREAR, C. J.: The Clerk will sign the decree and will note that counsel for defendants objects to the form of the decree.

Mr. Lightfoot here remarked that the Clerk had taken notes of the proceedings had yesterday in this case and desired to know whether the same will be recorded.

Chief Justice Frear stated that if counsel desired, the minutes may be recorded stating in said minutes however, that the Court met informally yesterday reserving formal action until today.

Mr. Lightfoot again rose stating that he desired to have the minutes recorded so that the grounds of their objections to the decree will appear.

At this point both C. W. Ashford, Esq., and S. H. Derby, Esq., representing the plaintiff herein, entered the Court-room and Mr. Ashford asked the Court if the decree as presented had been allowed, to which the Court replied in the affirmative, further informing counsel that the Clerk has been directed to sign and file said decree.

(Sgd.) J. A. THOMPSON,
Clerk Supreme Court.

272 THURSDAY, *May* 2, 1907.

Court convened at 10 o'clock A. M.
Present on the Bench: Hon. W. F. Frear, C. J.

P. 214.

C. B. MAILE
vs.
JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division, and H. VAN GIESON, Trustee.

Appeal from Circuit Judge, First Circuit.

Appearance.

C. W. Ashford for the Plaintiff.

Immediately upon convening of the Court and after Chief Justice Frear had taken his seat the Court, per Frear, C. J., renders an oral decision on the petition for rehearing filed on April 26, by H. Van Gieson, Trustee, one of the defendants in the above entitled case, said oral decision being as follows:

FREAR, *C. J.:*
In the case of C. B. Maile *versus* James W. Pratt, Assessor of Taxes and H. Van Gieson, Trustee, the petition for rehearing is denied.

There being no further business before the Court, at 10:3 A. M. it adjourned until 10 o'clock tomorrow morning, May 3.

(Sgd.) J. A. THOMPSON,
Clerk Supreme Court.

273 In the Supreme Court of the Territory of Hawaii, October Term, 1906, May Session, 1907.

C. B. MAILE, Plaintiff-Appellee,
vs.
JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii; HENRY VAN GIESON, Defendants-Appellant.

Petition for Appeal to the Supreme Court of the United States.

Henry Van Gieson, one of the defendants in the above entitled cause and appellant herein, respectfully shows that the above entitled cause is now pending in the Supreme Court of the Territory of Hawaii and that a decree has therein been rendered on the 25th day of April, A. D. 1907, reversing the decree of the Honorable J. T. De Bolt, First Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, dismissing plaintiff's bill as to H. Van Gieson; James W. Pratt, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii having been defaulted,

and a decree *pro confesso* as to him having been ordered; and that the matter in controversy in said suit exceeds $5000, besides costs; that this cause is one in which the Supreme Court of the Territory of Hawaii had final jurisdiction and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

274 Wherefore the said appellant prays that an appeal be allowed him in the above entitled cause directing the Clerk of the Supreme Court of the Territory of Hawaii to send the record and proceedings in said cause with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the assignment of errors herewith filed by the said appellant may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

And the appellant further prays that an order be made fixing the amount of security which your petitioner shall give and furnish upon said appeal and that upon the giving of such security all further proceedings in the above cause be suspended and stayed until the determination of the appeal by the Supreme Court of the United States.

Dated, Honolulu, May 6th, 1907.

(Sgd.) HENRY VAN GIESON, *Appellant.*

Endorsed: Supreme Court Territory of Hawaii. C. B. Maile, Plaintiff-Appellee, *vs.* James W. Pratt, *et al.* Defendants-Appellant. Petition for appeal to the Supreme Court of the United States. Filed May 6, 1907, at 3:10 o'clock P. M. J. A. Thompson, Clerk. Magoon & Lightfoot Magoon Building Honolulu, Attorneys for Appellant.

275 In the Supreme Court of the Territory of Hawaii, October Term, 1906, May Session, 1907.

C. B. MAILE, Plaintiff-Appellee,

vs.

JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii; HENRY VAN GIESON, Defendants-Appellant.

Assignment of Errors.

The appellant in the above entitled cause in connection with his petition for appeal herein presents and files herewith his assignment of errors as to which matters and things he says that the decree entered herein on the 25th day of April, 1907, is erroneous, to-wit:

First. The Supreme Court of the Territory of Hawaii erred in holding and deciding that as the District Magistrate of Honolulu had entertained a motion to stay execution, and ordered the sale to be postponed, that order should have been obeyed.

Second. The Supreme Court of the Territory of Hawaii erred in

holding and deciding that the necessary result of selling this property in disobedience of the order of the District Magistrate of Honolulu was to deter persons from bidding.

Third. The Supreme Court of the Territory of Hawaii erred in holding and deciding that there was no reason why the sale should not have been postponed as previously had been done at appellee's request.

276 Fourth. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that it was unnecessary to decide whether a Magistrate can stay execution in a case in which he would be authorized to set aside his judgment in order to avoid injustice and that the order should have been obeyed.

Fifth. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that orders must be obeyed unless the clearest reason be shown for disobeying them.

Sixth. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that the consequence of making the sale in defiance of the order and obtaining grossly inadequate prices is that the sale must be set aside and a reconveyance ordered.

Seventh. That the sale, being a sale under execution for satisfaction of a judgment for taxes, cannot be set aside for grossly inadequate prices; and the Supreme Court of the Territory of Hawaii erred in ordering said sale set aside.

Eighth. That the inadequacy of prices obtained at the sale was the result of the acts of plaintiff, and the Supreme Court of the Territory of Hawaii erred in setting the sale aside.

Ninth. The Supreme Court of the Territory of Hawaii erred in holding and deciding that "The maxim applies *'acta curæ neminem gravabit,'* no one should suffer for the act of the Court, not induced by his own fraud, deceit or other misconduct."

Tenth. The Supreme Court of the Territory of Hawaii erred in holding and deciding that appellant should reconvey to appellee the property purchased at the execution sale, even though "the appellee's course prior to the sale was not such as to entitle him to consideration in a court of equity."

Eleventh. The Supreme Court of the Territory of Hawaii erred in holding and deciding that the appellant should reconvey to appellee the property purchased at the execution sale even

277 though the sale to appellant was not illegal, and does not appear to have been the result of fraudulent collusion between appellant and the High Sheriff.

Twelfth. The Supreme Court of the Territory of Hawaii erred in holding and deciding that the sale must be set aside and a reconveyance ordered upon the plaintiff, within five days paying into Court a sum equivalent to the unsatisfied balance of the judgment and the purchase money, with interest and costs of court, upon which payment the decree appealed from will be reversed, otherwise it will stand affirmed.

Thirteenth. That the District Magistrate had no jurisdiction to make the order restraining the sale under execution, and said order was void, and that it is no ground for setting aside the sale that it

was made in violation of said order, even though such order may have resulted in causing the property to be sold at inadequate prices.

Fourteenth. The Supreme Court of the Territory of Hawaii erred in holding and deciding that the appellant should not be allowed attorney's fees and expenses.

Fifteenth. The Supreme Court of the Territory of Hawaii erred in holding and deciding in favor of the plaintiff and against the defendants, and more particularly in deciding (*a*) that said sale should be set aside and (*b*) that a reconveyance be made to plaintiff.

Wherefore the appellant prays that said decree may be reversed and that the appellee may have an adjudication and decree in his favor as herein specified.

(Sgd.) HENRY VAN GIESON, *Appellant.*

Endorsed: Supreme Court Territory of Hawaii. C. B. Maile, Plaintiff-Appellee, *vs.* James W. Pratt, *et al.* Defendants-Appellant. Assignment of Errors. Filed May 6, 1907, at 3:10 o'clock P. M. J. A. Thompson, Clerk. Magoon & Lightfoot Magoon Building Honolulu Attorneys for appellant.

278 In the Supreme Court of the Territory of Hawaii, October Term, 1906, May Session, 1907.

C. B. MAILE, Plaintiff-Appellee,

vs.

JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii; H. VAN GIESON, Defendants-Appellant.

Order Allowing Appeal.

It is hereby ordered that the appeal in the above entitled case to the Supreme Court of the United States be and is hereby allowed as prayed.

And it is hereby further ordered that the amount of the supersedeas bond be and is hereby fixed at Two Thousand Dollars.

[SEAL.] (Sgd.) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Endorsed: Supreme Court Territory of Hawaii. C. B. Maile *vs.* James W. Pratt, *et al.* Order Allowing Appeal. Filed May 6, 1907, at 3:10 o'clock P. M. J. A. Thompson, Clerk. Magoon & Lightfoot Magoon Building Honolulu, Attorneys for Appellant.

279 In the Supreme Court of the Territory of Hawaii, October Term, 1906, May Session, 1907.

C. B. MAILE, Plaintiff-Appellee,
vs.
JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii; HENRY VAN GIESON, Defendants-Appellant.

Bond.

Know all men by these presents that we, H. Van Gieson, principal and E. Coit Hobron, surety, both of Honolulu, County of Oahu Territory of Hawaii, are held and firmly bound unto C. B. Maile in the sum of Two Thousand Dollars to be paid to the said C. B. Maile his executors, administrators and assigns; to which payment well and truly to be made we bind ourselves and our respective heirs, executors and administrators, jointly and severally firmly by these presents;

Sealed with our seals and dated the 6th day of May, 1907.

Whereas the appellant in the above entitled suit has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entitled in said cause in the Supreme Court of the Territory of Hawaii on the 25th day of April, 1907.

Now therefore the condition of this obligation is such that if the said appellant shall prosecute said appeal to effect, and answer all damages and costs, if he fail to make said appeal good, then
280 this obligation shall be void; otherwise to remain in full force and virtue.

(Sgd.) HENRY VAN GIESON.
(Sgd.) E. COIT HOBRON.

CITY OF HONOLULU,
County of Oahu, Territory of Hawaii, ss:

E. Coit Hobron, the surety named in the foregoing bond, being first duly sworn, says:

That he is a resident and freeholder in the County of Oahu, Territory of Hawaii and is worth the sum of $5,000 over and above all his just debts and liabilities exclusive of property exempt from execution.

(Sgd.) E. COIT HOBRON.

Subscribed and sworn to before me this 6th day of May, 1907.

(Sgd.) HENRY SMITH,
Clerk Cir. Court, First Circuit.

The foregoing bond is approved this 6th day of May, 1907.

(Sgd.) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Endorsed: Supreme Court Territory of Hawaii. C. B. Maile, Plaintiff-Appellee, *vs.* James W. Pratt, *et al.* Defendants-Appellant. Bond. Filed May 6, 1907, at 3:10 o'clock P. M. J. A. Thompson, Clerk. Magoon & Lightfoot, Magoon Building, Honolulu. Attorneys for Appellant.

281 In the Supreme Court of the Territory of Hawaii, October Term, 1906, May Session, 1907.

C. B. MAILE, Plaintiff-Appellee,

vs.

JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii; H. VAN GIESON, Defendants-Appellant.

Order.

To James A. Thompson, Esquire, Clerk of the Supreme Court of the Territory of Hawaii:

You are hereby ordered to include in the record on appeal to the Supreme Court of the United States, the original transcript of the testimony taken in the above entitled cause, the same being now on file in the records of this Court, upon filing a certified copy of said transcript.

Dated, Honolulu, May 20, 1907.

(Sgd.) W. F. FREAR,
[SEAL.] *Chief Justice of the Supreme Court, Territory of Hawaii.*

Endorsed: Supreme Court Territory of Hawaii. C. B. Maile *vs.* James W. Pratt, *et al.* Order. Filed May 20, 1907, at 9:50 o'clock A. M. J. A. Thompson, Clerk. Magoon & Lightfoot, Magoon Building Honolulu Attorneys for Plaintiff.

282 In the Supreme Court of the United States

C. B. MAILE, Plaintiff-Appellee,

vs.

JAMES W. PRATT, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii; HENRY VAN GIESON, Defendants-Appellant.

Citation to Appellee.

The United States of America to C. B. Maile:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the city of Washington, in the District of Columbia, sixty days after the date of this citation pursuant to an appeal allowed and filed in the Clerk's office of the Supreme Court of the Territory of Hawaii, wherein Henry Van

Gieson is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Walter F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, this 6th day of May, A. D. 1907.

[Seal Supreme Court, Territory of Hawaii.]

W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Service of a copy of the within citation is hereby admitted, this 6th day of May, A. D. 1907.

C. W. ASHFORD,
Attorney for C. B. Maile, Appellee.

283 [Endorsed:] Supreme Court of the United States. C. B. Maile, Plaintiff-appellee, *vs.* James W. Pratt, *et al.* Defendants-appellant. Citation to appellee. Filed May 6 1907 at 4:7 o'clock P. M. J. A. Thompson, Clerk Supreme Court Territory of Hawaii.

284 In the Supreme Court of the Territory of Hawaii, October Term, 1906.

C. B. Maile, Plaintiff,
vs.
James W. Pratt, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii, and H. Van Gieson, Defendants.

Certificate of Clerk to Transcript of Record.

Territory of Hawaii, *County of Oahu, Honolulu, ss:*

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing petition of H. Van Gieson for appeal to the Supreme Court of the United States and in obedience thereto and in pursuance of the Praecipe herein filed, a copy of which is hereto annexed, I hereby certify that the foregoing pages numbered from 3 to 89 inclusive and pages numbered from 245 to 272 inclusive, contain a true and complete transcript of record and proceedings had in the above entitled Court in the case entitled C. B. Maile, Plaintiff, *vs.* James W. Pratt, Assessor of Taxes in and for the First Taxation Division of the Territory of Hawaii and H. Van Gieson, Defendants, as the same remain of record and on file in my office.

I further certify that the foregoing pages numbered from 273 to 283 inclusive contain true and correct copies of the "Petition of H. Van Gieson for Appeal to the Supreme Court of the United States,"

"Assignment of Errors," "Order Allowing Appeal," "Bond on Appeal" and "Order for transmission of the original transcript of testimony," and that the original transcript of testimony is included in the foregoing transcript of record, being pages numbered from 90 to 244 inclusive, and that the Original Citation to Appellee and proof of service thereof is hereto attached and herewith returned.

In testimony whereof I have caused the seal of said Supreme Court of the Territory of Hawaii to be hereunto affixed at Honolulu in said Territory this 24th day of May, A. D. 1907.

[Seal Supreme Court, Territory of Hawaii.]

JAMES A. THOMPSON,
Clerk Supreme Court, Territory of Hawaii.

Endorsed on cover: File No. 20,780. Hawaii Territory supreme court. Term No. 377. Henry Van Gieson, appellant, *vs.* C. B. Maile. Filed July 5th, 1907. File No. 20,780.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

NO. 121.

HENRY VAN GIESON, APPELLANT,

vs.

C. B. MAILE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF OF APPELLANT

(20,780.)

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 121.

HENRY VAN GIESON,
Appellant,
vs.
C. B. MAILE.

BRIEF OF APPELLANT.

Counsel for appellant, in the Supreme Court of the Territory, failed to follow the practice prescribed by the Act of Congress, of April 7, 1874, 18 Statutes at Large, 27. And treated the within action as one reviewable by writ of error incorporating the evidence at large in the record of appeal, instead of causing a statement of the facts of the case in the nature of a special verdict to be certified by the court below and transmitted to this court with a transcript of the proceedings and decree.

The opinion of the Territorial Supreme Court, however, fully sets forth the facts, and we respectfully pray the indulgence of the court and a review of the within cause upon the facts stated in the opinion under the ruling of *Strongfellow v. Cain*, 96 U. S. 610, 25 L. E. 421-422; *Harrison v. Perea*, 168 U. S. 311-323, 42 L. E. 478; and *Bierce v. Hutchins*, 205 U. S. 340-344.

STATEMENT OF FACTS.

We quote verbatim the facts found by the Territorial Supreme Court as set forth in its opinion. (Record, pages 141, et seq.):

"The plaintiff appeals from a decree dismissing his bill to set aside an execution sale of three parcels of his land valued at about $11,760 which were sold by the high sheriff July 5, 1904, to the defendant Van Giesen for sums aggregating $535. The facts material to the case which are averred in the bill and either admitted in the answer or which we find from the evidence are as follows:

"The defendant Pratt, when assessor and collector of taxes, brought an action 'in his official capacity' December 7, 1903, against the plaintiff in the district court of Honolulu to recover $488.60 taxes for the years 1900, 1901 and 1902. The summons, which included a statement of the claim, was issued the same day returnable December 11 and was served that day upon the plaintiff by the officer delivering to him a true copy. The plaintiff not appearing, the district magistrate on December 18, adjudged him to be in default and rendered judgment against him for $540.11, the sum claimed, with the statutory penalty and costs, upon which judgment execution was issued December 19 against the personal property of the plaintiff and returned unsatisfied January 7, 1904, the officer's return setting forth that he had 'Executed the within writ by making a due and diligent search within the judicial district of Honolulu, Island of Oahu, Territory of Hawaii, for personal property belonging to the within named C. B. Maile and subject to execution and no such property can be found within said judicial district.' Thereafter another execution, the date of which does not appear, was issued directing levy upon the plaintiff's personal property 'and if sufficient cannot be found, then upon his real property' and to sell the same or so much thereof as should be necessary

to satisfy the judgment. Pursuant to the second writ, certain real property of the plaintiff was advertised for sale, but the execution was withdrawn upon the promise of John F. Colburn, the plaintiff's agent, that he would settle. The promise not being kept, a third execution similar to the second was issued May 25, 1904, the defendant Pratt having meanwhile been succeeded by James L. Holt as assessor and collector. Before anything was done upon the third execution, the plaintiff expressed to the high sheriff his surprise that his agent had not paid the judgment, saying that the money to pay it was in the agent's hands and that he desired its payment. The judgment not being paid, however, the property was advertised for sale on June 27, 1904, at noon, at which time, at the request of the agent, the sale was continued until July 5. The levy was made by posting the high sheriff's notice of it describing the property to be sold in three conspicuous places within the district and publishing it in a Honolulu daily newspaper during thirty days prior to the time appointed. According to the usual course, the notice would have been posted on the premises and it may be inferred although it does not appear that this was done in this instance. June 30, the plaintiff moved the district court to recall the third, or, as it is termed, alias execution, on the ground that the court had not obtained jurisdiction of his person by service of the summons above shown; that the action was irregularly brought in the name of Pratt without averring that the money sued for was for the use of the Territory; that at the date of the alias execution, Pratt was not collector, and that the high sheriff had levied upon the realty without levy upon or search for personal property, which motion the magistrate denied. July 1, a new magistrate being in office, the plaintiff moved that the service of summons be quashed because not made as provided by law and for a temporary restraining order forbidding the sale under the alias execution,

upon which motion the magistrate made an order that the high sheriff refrain from selling until further order of the court, and set July 6 for hearing the motion, requiring service of the order to be made upon the high sheriff and the attorney for Pratt, which service was made as ordered. At the sale July 5, which was made notwithstanding the order, the plaintiff's attorney protested against it on the grounds that the judgment was void because the district court had not jurisdiction of his person, and because the sale was forbidden by the magistrate, and announced that no purchaser could obtain a valid title, and that the plaintiff would resist claim of title of any purchaser, the defendant Van Gieson, who was the high sheriff's office clerk and the officer who had indorsed the return of service on the summons, being present and within hearing distance. While bidding upon the second parcel was in progress, the high sheriff announced that he should insist upon deposit upon fall of the hammer for each parcel then unsold of fifty per cent. of the purchase money, a condition not contained in the notice of sale and not enforced against Van Gieson, the high sheriff after the sale going with him to the bank and obtaining the money there. July 6 the plaintiff moved the magistrate to set aside the sale upon the grounds mentioned in his motion of June 30 to stay it. Both motions were denied August 15.

"The prices obtained at the sale were exceedingly disproportionate to the value of the land.

* * * "The plaintiff had been informed of the amount of the judgment, and his agent had agreed to pay it, the second execution having therefore been withdrawn. He was notified by the high sheriff's notice of sale, posted upon his premises, that they were proposed to be sold upon execution.

* * * "The broken promises to pay the judgment justified the high sheriff in refusing to take the plaintiff's bids unaccompanied by a cash deposit.

"The sale to the subordinate by the high sheriff * * * does not appear to have been the result of fraudulent collusion between them."

ASSIGNMENT OF ERRORS.

The Appellant herein relies upon all the assignment of errors specified hereunder, with the exception of assignment fourteen (14).

First. The Supreme Court of the Territory of Hawaii erred in holding and deciding that as the District Magistrate of Honolulu had entertained a motion to stay execution, and ordered the sale to be postponed, that order should have been obeyed.

Second. The Supreme Court of the Territory of Hawaii erred in holding and deciding that the necessary result of selling this property in disobedience of the order of the District Magistrate of Honolulu was to deter persons from bidding.

Third. The Supreme Court of the Territory of Hawaii erred in holding and deciding that there was no reason why the sale should not have been postponed as previously had been done at appellee's request.

Fourth. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that it was unnecessary to decide whether a Magistrate can stay execution in a case in which he would be authorized to set aside his judgment in order to avoid injustice and that the order should have been obeyed.

Fifth. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that orders must be obeyed unless the clearest reason be shown for disobeying them.

Sixth. That the Supreme Court of the Territory of Hawaii erred in holding and deciding that the consequence of making the sale in defiance of the order and obtaining grossly inadequate prices is that the sale must be set aside and a reconveyance ordered.

Seventh. That the sale, being a sale under execution for satisfaction of a judgment for taxes, cannot be set aside for grossly inadequate prices; and the Supreme Court of the Territory of Hawaii erred in ordering said sale set aside.

Eighth. That the inadequacy of prices obtained at the sale was the result of the acts of plaintiff, and the Supreme Court of the Territory of Hawaii erred in setting the sale aside.

Ninth. The Supreme Court of the Territory of Hawaii erred in holding and deciding that "The maxim applies *'acta curiæ neminem gravabit,'* no one should suffer for the act of the Court, not induced by his own fraud, deceit or other misconduct."

Tenth. The Supreme Court of the Territory of Hawaii erred in holding and deciding that appellant should reconvey to appellee the property purchased at the execution sale even though "the appellee's course prior to the sale was not such as to entitle him to consideration in a court of equity."

Eleventh. The Supreme Court of the Territory of Hawaii erred in holding and deciding that the appellant should reconvey to appellee the property purchased at the execution sale even though the sale to appellant was not illegal, and does not appear to have been the result of fraudulent collusion between appellant and the High Sheriff.

Twelfth. The Supreme Court of the Territory of Hawaii erred in holding and deciding that the sale must be set aside and a reconveyance ordered upon the plaintiff, within five days paying into Court a sum equivalent to the unsatisfied balance of the judgment and the purchase money, with interest and costs of court, upon which payment the decree appealed from will be reversed, otherwise it will stand affirmed.

Thirteenth. That the District Magistrate had no jurisdiction to make the order restraining the sale under execution, and said order was void, and that it is no ground for setting aside the sale that it was made in violation of said order, even though such order may have resulted in causing the property to be sold at inadequate prices.

Fourteenth. The Supreme Court of the Territory of Hawaii erred in holding and deciding that the appellant should not be allowed attorney's fees and expenses.

Fifteenth. The Supreme Court of the Territory of Hawaii erred in holding and deciding in favor of the plaintiff and against the defendants, and more particularly in deciding (*a*) that said sale should be set aside and (*b*) that a reconveyance be made to plaintiff.

BRIEF OF ARGUMENT.

Under the allegations of the bill of complaint, the within cause naturally resolves itself into two questions: First, the validity of the judgment rendered in the District Court of Honolulu in the action of assumpsit for taxes brought by the Territory against C. B. Maile, appellee herein; second, the validity of the execution sale predicated upon that judgment.

The ground of invalidity of the judgment as presented by appellee was that he, as defendant in the assumpsit suit, had not been properly served with process; the grounds of invalidity of the execution sale were: (a) Upon the resignation of the tax assessor, subsequent to the issuance of the first execution returned nulla bona and before the issuance of the third and final execution upon which the sale was had, the action of assumpsit for taxes should have been revived in the name of his successor in office; (b) The District Court of Honolulu was, and is without authority to issue alias execution; (c) Levy under the alias execution was improperly made by the officer executing the same; (d) The officer executing the alias execution failed and refused to obey the stay or restraining order of the District Magistrate; (e) The real estate of the judgment debtor, appellee herein, was sold at the execution sale for an inadequate price; and (f) Fraud in the conduct of the execution sale.

The local Supreme Court by its opinion decided in favor of appellant upon all the grounds raised by the bill with the exception of the ground of inadequacy of price, which involve appellant's assignments of error number one, to thirteen, inclusive, and fifteen, which are herein relied upon, and by reason of their close connection and bearing on the one point are considered together.

We shall discuss the questions involved in the order as hereinbefore indicated, concluding with the general grounds of want of equity and the adequacy of legal remedy.

THE DEFENDANT IN THE ACTION OF ASSUMPSIT FOR TAXES WAS PROPERLY SERVED WITH PROCESS.

Section 1705 of the Revised Laws of Hawaii is as follows:

> "ORIGINAL SUIT. The original writ in all civil actions begun before a district court, shall be a summons, a writ of replevin, a capias or an attachment, and shall be signed by the magistrate of such court, and shall contain a notification to the defendant that if he fails to attend at the time and place of trial designated in the writ, judgment will be rendered upon default according to the evidence taken ex parte. All original writs shall be returnable not less than one nor more than six days from the date of issue."

Section 1269 of the Revised Laws as amended by Act 89 of the Session Laws of the Territory of Hawaii for the year 1905 provides:

> "If any tax be unpaid when due the assessor may proceed to enforce the payment of the same with all penalties as follows:
>
> 1. * * *
>
> 2. By suit or action in assumpsit in his own name on behalf of the Territory of Hawaii for the amount of taxes and costs, or if such tax is delinquent for the amount of taxes, costs, penalties and interest in any district court irrespective of the amount claimed. Execution may issue upon any judgment rendered in any such suit which may be satisfied out of any real or personal property of the defendant in such suit without other or further authority."

The law makes no special requirement in the case of district courts as to service of process and where no particular method of service is designated by statute, all that can reasonably be required is that the purpose of summons be satisfied; that is, that the defendant have reasonable notice of the pendency of the proceedings.

The purpose of a summons is notice of the pendency of suit.

McCoun vs. New York Central Ry., 50 N. Y. 183;
Rose vs. Glass, 70 Ind. 391;
Collins vs. Merriam, 31 Vt. 622;
Rand vs. Rand, 4 New Hampshire, 276, 277;
Kalanianaole vs. Dimond, 15 Hawn. 486;
H. Hackfeld & Co. vs. Cooper, 18 Hawn. 585;
United States vs. McMahon, 164 U. S. 87.

In this case the court held:

> "There was no defect in the service as the statute does not require that in district court cases a certified copy of summons be served or that the original be either read or shown." (Record p. 142.)

The district court of Honolulu therefore had jurisdiction of the person and the subject matter of the suit and was entitled to proceed with and dispose of the case in the absence of the defendant.

MOREOVER THE DEFENDANT IN THE ACTION FOR ASSUMPSIT FOR TAXES APPEARED GENERALLY IN HIS MOTIONS THEREBY WAIVING DEFECTS OR IRREGULARITIES IN SERVICE OF PROCESS.

In the motions of defendant of June 30, July 1 and July 6, he appeared generally. (See Record p. 38.) And the court below properly held:

"If the service had been defective the plaintiff's appearances in his motions were not special appearances for the sole purpose of objecting to defect of process or to the jurisdiction of the court over his person and would properly be held to be general appearances waiving defects and irregularities in service of process. An objection to jurisdiction over the person cannot be submitted at the same time with an objection to the jurisdiction over the subject matter. See *Fitzgerald vs. Fitzgerald*, 137 U. S. 106." (See Record p. 142.)

EQUITY WILL NOT INTERVENE WHERE THE COMPLAINANT HAS BEEN GUILTY OF LACHES.

This point is made in reference to the prayer of the bill to vacate and set aside the judgment upon the ground of irregularity in the service of process and is not directed to the question of the validity of the execution sale.

It is a maxim in equity that vigilantibus non dormientibus aequitas subvenit. The record shows as above pointed out that the defendant Maile was served with process upon the 7th of December. No motion was ever made to open the default. And it nowhere appears either in the record or the bill that he had a good and meritorious defense to the action. There was ample to put Maile on notice and inquiry and time to secure a review of the case through the proper and ordinarily prescribed channels. Under such circumstances equity should not go to his assistance.

Woods vs. Breezeriaaki, 57 Conn. 471; 81 Atl. 252;
Peoria D. & E. vs. Dugann, 32 Ill. Appeals 351;
Krug vs. Davis, 85 Ind. 309;
Sherwood vs. Mather, 14 Md. 564;
Kemp vs. Cook, 18 Md. 130, 79 Am. Dec. 681;

Montgomery vs. Murphy, 19 Md. 576, 81 Am. Dec. 562;
McCormick vs. Hogan, 48 Md. 404;
Grow vs. Bassett, 7 Minn. 325;
Walker vs. Anderson, 18 N. J. L., 217;
McQuillan vs. Hunter, 7 Leg. Int. 50;
Copper vs. Gardner, 1 How. Prac. 142;
Hill vs. Batty, 62 Cal. 292;
Gilman vs. Arnold, 11 S. E. 331.

REVIVER OF THE ACTION OF ASSUMPSIT WAS UNNECESSARY.

Section 1269 of the Revised Laws of Hawaii (supra) provides that: "The assessor may proceed to enforce the payment" of the taxes "by suit or action in assumpsit in his own name on behalf of the Territory of Hawaii. * * *"

Further, Section 1193 of the Revised Laws of Hawaii provides:

> "The successor of any assessor or deputy assessor shall be vested with the same powers and be subject to the same duties and liabilities as his predecessor, and shall collect all taxes then unpaid, and shall carry on any proceedings commenced by his predecessor; provided, however, that the liability to collect, account for and pay over taxes shall extend only to the taxes uncollected at the time of entering on his duties."

Under these circumstances it was perfectly proper to proceed in the name of the predecessor in office. The court below held:

> "Action for taxes may be brought by the assessor 'in his own name on behalf of the Territory.' Sec. 1269 Revised Laws. The appointment of the new assessor and collector made after the first and before the third execution did not require that proceedings be revived in the name of the new officer."

THE DISTRICT COURT OF HONOLULU HAS AUTHORITY TO ISSUE ALIAS EXECUTION.

Section 1269 (supra) provides that:

> "Execution may issue upon any judgment rendered in any such suit which may be satisfied out of any real or personal property of the defendant in such suit without order or further authority."

Further, Section 1807 of the Revised Laws provides:

> "No original execution shall be issued, unless within one year after the party shall be entitled to sue out the same, and no alias, or other successive execution, shall be issued afterwards, unless each one be sued out within one year after the return day of that which preceded it."

And Section 1809 of the Revised Laws provides:

> "Every district magistrate, *shall*, at the request of the party recovering any civil judgment in his court, unless such judgment be duly appealed from, issue his execution against the property of the party recovered against, which execution may be in the following form: To any police officer of the district of ————, island of ————, Territory of Hawaii:
>
> You are commanded to levy upon the personal property of ————, if any within your district, and if sufficient cannot be found, then upon his real property within said district, and giving thirty days previous notice as required by law, to sell the same, or so much thereof as may be found necessary, at public sale to the highest bidder, in order to satisfy a judgment rendered by me against him in favor of ————, on the ——— day of ————, 19——, for ———— dollars, the costs of court inclusive, collecting also the legal interest thereon, from the date thereof, and your costs and the expenses of levy, advertisement and sale.

Make due return to me of this writ, with your proceedings thereon, and the money by you so collected, on or before the expiration of ———— days; and hereof fail not at your peril.

Given under my hand this ——— day of————, 19——.

———————————————

District Magistrate."

The alias execution issued was authorized by Sec. 1807 and Sec. 1809 of the Revised Laws of Hawaii. The court below held:

> "The alias execution issued 'within one year after the return day of that which proceeded it' was authorized by Sections 1807 and 1809 R. L." (See Record p. 143.)

LEVY WAS PROPERLY MADE BY THE OFFICER EXECUTING THE ALIAS EXECUTION.

The court below found as a fact that "the plaintiff had been informed of the amount of the judgment and his agent had agreed to pay it, the second execution having therefore been withdrawn. He was notified by the High Sheriff's notice of sale posted upon his premises that they were proposed to be sold upon execution." (See Record p. 143.)

Section 1817 of the Revised Laws provides:

> "Every levy by an officer, in pursuance of a writ of execution issued by any court or judge, shall be made by taking the property levied upon into his possession, care and guardianship, and in his option, by removal of the same to some place of security. The officer shall make an inventory of the property levied upon."

Section 1818 of the Revised Laws provides:

> "The officer shall, after levy, advertise for sale the property levied upon, whether real or personal, for thirty days, or for such time as the court shall order, by posting a written or printed notice in three conspicuous places within the district where such property is situated, and if on the island of Oahu, by advertisement thereof at least three times in one or more newspaper or newspapers published at Honolulu, island of Oahu, Territory of Hawaii."

The statutes were fully complied with and the levy was properly made.

The court below held:

> "The levy was sufficiently made by advertising in the newspapers and by posting the notices in public places and upon the premises."

THE OFFICER EXECUTING THE ALIAS EXECUTION PROPERLY REFUSED TO OBEY THE STAY OR RESTRAINING ORDER OF THE DISTRICT MAGISTRATE.

The District Court is one of inferior and limited jurisdictions.

Its civil jurisdiction is provided by Sec. 1662 of the Revised Laws, which is as follows:

> "The district courts shall have original and exclusive jurisdiction of all civil actions, except as otherwise provided, where the debt, amount or damages, or the value of the property claimed, shall not exceed fifty dollars; and concurrent jurisdiction in all civil actions, except as aforesaid, where the debt, amount or damages, or the value of the property claimed, shall not exceed three hundred dollars, and shall have original jurisdiction in all statutory proceedings as conferred by law upon dis-

trict courts or which may hereafter be placed by law within the jurisdiction of district courts, and to try and determine the same, subject to appeal according to law; provided, however, that such courts shall not have cognizance of real actions, nor actions in which the title to real estate shall come in question, nor actions for libel, slander, defamation of character, malicious prosecution, false imprisonment, breach of promise of marriage, or seduction, nor of any civil matter required by law to be tried by a jury; nor shall they have power to appoint referees in any cause."

And its powers are fixed by Section 1663 of the Revised Laws, which is as follows:

"The district magistrates shall have power to administer oaths, to perpetuate testimony under commissions issued to them from other courts, and to issue commissions for the perpetuation of testimony to be used in controversies pending before them, to grant continuances of proceedings before them, to subpoena and compel the attendance of witnesses within their respective districts, to enforce judgment and to punish contempts according to law."

Its powers to issue execution are fixed by Sections 1807, 1808 and 1809 (supra) of the Revised Laws of Hawaii.

Section 1807 of the Revised Laws of Hawaii is as follows:

"No original execution shall be issued, unless within one year after the party shall be entitled to sue out the same, and no alias, or other successive execution, shall be issued afterwards, unless each one be sued out within one year after the return day of that which preceded it."

Section 1808 of the Revised Laws of Hawaii is as follows:

> "If a judgment remains unsatisfied, after the expiration of the time for taking out execution thereon, the plaintiff may have scire facias to obtain a new execution, or he may, at any time after the judgment, subject to the statute of limitations, have an action of debt thereon."

There is no provision in respect to district courts for a stay by the magistrate of execution issued out of that court. The only provision concerning stays of execution is to be found in Sec. 1815 of the Revised Laws, which is as follows:

> "Any judge of a court of record may, by order at chambers, in any cause in which an execution shall have been issued, grant a stay thereof in the officer's hands, for equitable reasons, when no appeal or writ of error is granted, upon the defendant giving bond and security for its payment with costs up to the said stay. The property levied upon shall not be released from the levy by the stay of execution, and in case at the end of the time accorded the condition of such bond be not complied with, the plaintiff in execution may elect whether to proceed to the sale of the levied property, or to enforce the bond; provided, that if the levied property be not sufficient to pay the judgment, with all costs, expenses and commissions, the stay inclusive, the sureties in the bond shall be answerable for the deficiency. And when justice may require the renewal of any execution, or an extension of the time for making return to any execution, any judge of a court of record shall have power so to do."

The jurisdiction of the district court is purely statutory and must be exercised in the manner and within the limits prescribed by the statutes granting it.

Evans vs. Pierce, 3 Ill. 468;
Matlock vs. Strange, 8 Ind. 57;
Sara Way's Case, 41 Mich. 299;
Baker vs. Chisholm, 3 Texas 157;
Man'f. Co. vs. Harrington, 53 Iowa 381.

Statutes giving jurisdiction to inferior courts must be strictly construed.

Walker vs. Wynne, 111 Tenn. 62;
Ohio & M. R. Co. vs. Hannah, 16 Ind. 391;
Evans vs. Price, 3 Ill. 468;
Matlock vs. Strange, 8 Ind. 57;
Gribbs vs. Borland, 14 Tenn. 481.

There is no presumption in favor of inferior courts. It only the power and jurisdiction expressly granted to it by the statutes creating it. And in general it is necessary that the record should show that the proceeding in question was within the jurisdiction of the court.

Murfree Jus. Pr., Sec. 108, 109, 110;
See also *Hickman vs. O'Neill*, 10 Cal. 295;
Winter vs. Fitspatrick, 35 Cal. 273;
Johns vs. Reed, 1 John Cases (N. Y.) 20;
O'Connor vs. Blake, 29 Cal. 312;
Cowan vs. Nixon, 28 Texas 231, 239;
Fryer vs. McNorton, 110 Mich. 22, 26;
McCombs vs. City of Pennsylvania, 211 Pa. St. 391, 60 Atl. 1001;
Murfree Jus. P., Sec. 344.

Moreover the magistrate of the district court has no equity powers.

Brown vs. Gable, 97 Ind. 86.

The stay or restraining order was therefore absolutely void and not binding upon the High Sheriff. This order, being

absolutely void, could be, as it was, totally disregarded. A void order has no legal force or effect and is not binding upon any one.

15 Encyc. Pl. & Pr., 328-355, 359.

"A justice of the peace has no authority over execution."

Murfrees Justice Pr., Sec. 644.

A stay of execution is statutory. A stay of execution being a privilege in derogation of the common law right, the party claiming the privilege must bring himself clearly within the statute granting it.

Erie City Bank vs. Compton, 27 Pa. St. 195.

See also

Oakes vs. Williams, 107 Ill. 154;
Livermore v. Hodgins, 54 Cal. 637;
Bailey vs. Ward, 37 Cal. 121;
20 Encyc. Pl. & Pr., 1845;
Kleber's Void Jud. Sales, 64.

INADEQUACY OF PRICE ALONE IS NOT SUFFICIENT TO INVALIDATE AN EXECUTION SALE.

The rule is well settled that the mere inadequacy of the price at which property is sold at an execution sale will not of itself, in the absence of any irregularities in the conduct of the sale, warrant the court in setting aside such sale.

17 Cyc. 1276, and cases cited.

Some authorities go to the effect that where the inadequacy of price at an execution sale is so gross as to shock the understanding or the conscience of the court it will of itself set aside the sale in order to promote the ends of justice. In the latter cases, however, the authorities supporting the proposition proceed upon ancillary matters thereto and suspicion of fraud upon

the price bid. Such is the case of *Graffin vs. Burgess*, 117 U. S. 180, 27 Lawyers Ed. 839. And no well considered cases rebut the proposition that in execution sales mere inadequacy of price will *not* invalidate the sale. In other words, some fraud or acts amounting to fraud upon the judgment creditor must appear in connection with the inadequacy of price before a court would be justified in setting aside a sale.

In this case the fraud, if any, was on judgment debtor's part.

NO FRAUD OCCURRED IN THE CONDUCT OF THE EXECUTION SALE.

The court below found it as a fact that "the plaintiff had been informed of the amount of the judgment and his agent had agreed to pay it, the second execution having therefore been withdrawn." And that "the sale to the subordinate by the High Sheriff does not appear to have been the result of fraudulent collusion between them." Further, that "the broken promises to pay the judgment justified the High Sheriff in refusing to take the plaintiff's bid unaccompanied by a cash deposit." (See Record p. 113.)

No impropriety existed in the fact that the sheriff's clerk bid and became a purchaser at the sale. No privity existed between him and either the sheriff or the judgment debtor. He was not a deputy sheriff. And under such circumstances, his bid was perfectly valid. The general rule is that all persons are permitted to become purchasers at an execution sale, provided they are competent to contract, and do not occupy such a relation with the execution debtor as would prevent them from making their interest antagonistic to his.

Parish Concordia vs. Berthieu, 15 So. 60;

Smith vs. Perkins, 84 Tex. 152; 16 S. W. 805;

Jackson vs. Anderson, 4 Wend. 68.

The facts as found by the court therefore leave for consideration but one question, as to whether or not the failure of the High Sheriff to obey the stay or restraining order of the district magistrate, coupled with the inadequacy of prices bid was and is sufficient to set aside the sale.

We have hereinbefore conclusively shown, we submit, that the order of the district magistrate, be it called a stay of execution or restraining order, was absolutely void and of no effect. But under the facts we further submit the High Sheriff was entitled and it was his duty to proceed with the sale and disregard the evident "bluff" of the counsel of the judgment debtor. The action in assumpsit for taxes was instituted in the district court on the 7th of December, 1903, and made returnable on the 11th of December following. The defendant defaulted and on the 18th of December judgment was entered in favor of the Territory and against the defendant. Whether or not his absence was willful the evidence does show and the existence of the judgment was known to the defendant himself and his agent, John F. Colburn, prior to May 25, 1904, the date of the issuance of the third execution. Section 1858 of the Revised Laws provides as follows:

> "Appeals shall be allowed from all decisions of district magistrates in all matters, whether civil or criminal, to the circuit court of the same circuit, whenever the party appealing shall file notice of his appeal within five days, and shall pay the costs accrued within ten days and, if it is a civil cause, shall deposit a sufficient bond in the sum of one hundred dollars conditioned for the payment of the costs further to accrue in case he is defeated in the court above, or money to the same amount within ten days after the decision appealed from; provided, however, that if in his notice of appeal he signifies his desire to waive a jury, he shall only be

required to deposit as surety for further costs a bond in the sum of twenty dollars, or money to the same amount. And in such case, if it is a civil cause, if the appellee, or any appellee in the cause, shall desire to have it tried before a jury on appeal, he shall not be denied if he shall, within twenty days after the decision appealed from, file his motion to that effect in the circuit court, and shall deposit his bond or money in the sum of one hundred dollars for the payment of costs to accrue in case he is defeated in the court above. But in case such waiver of jury by the appellant is not objected to by any appellee as signified by his motion for a trial by jury as aforesaid, the cause shall be tried without a jury, and may be tried by the circuit judge in vacation by agreement of parties. And after the trial and conclusion of such cause on appeal, whether by verdict of a jury or by the decision of the circuit judge, jury being waived as aforesaid, there shall in such cause be no further trial of the issue of fact (unless a new trial of such cause shall be awarded according to law), but exceptions upon questions of law may be taken to the supreme court, and further provided, that any appeal solely upon points of law from a decision of a district magistrate shall be so stated in the notice of appeal, and such appeals upon points of law may be made either to the circuit court of the same circuit, or to the supreme court, at the option of the party appealing, and such appeal shall be heard and determined without the intervention of a jury; and the bond shall be the same as hereinbefore provided in the case of waiver of jury."

Section 1861 of the Revised Laws provides as follows:

"An appeal duly taken and perfected in any case from a judgment, order or decree of a circuit judge or district

magistrate shall operate as an arrest of judgment and stay of execution; provided, however, that the judge or magistrate may, upon good cause shown, allow execution to issue or other appropriate action to be taken for the enforcement of such judgment, order or decree, pending such appeal, unless the appellant shall within such time as shall be allowed by the judge or magistrate deposit a bond in such amount and with such sureties as shall be approved by the judge or magistrate (the amount to be not less than double the amount of the judgment, order or decree, if it is a money judgment, order or decree) conditioned for the prosecution of the appeal without delay and for the payment or other performance, as the case may be, of the judgment, order or decree or part thereof that may be rendered or affirmed against him in the appellate court; and, provided further, that no political corporation or officer or executor, administrator, guardian, trustee or receiver, acting in his official capacity, need deposit such bond in order to prevent the enforcement of such judgment, order or decree, pending the appeal, and provided further, that in case of an appealable order of a circuit judge for counsel fee, suit money, temporary alimony, or other provisional order of a like nature made before final judgment in the cause, an appeal shall not operate as an arrest of judgment or stay of execution, if the appellee shall deposit a bond in such sum and with such sureties as the judge shall approve, conditioned for indemnification of the appellant for all damages that he may sustain by reason of the payment or execution of such order, in case the appeal shall be sustained."

Section 1869 of the Revised Laws provides as follows:

"A writ of error may be had by any party deeming himself aggrieved by the decision of any justice, judge

or magistrate, or by the decision of any court except the supreme court, or by the verdict of a jury, at any time before execution thereon is fully satisfied, within six months from the rendition of judgment."

Section 1876 of the Revised Laws provides as follows:

"No writ of error shall issue until the sum of twenty-five dollars has been deposited to cover costs, and a bond has been filed with the clerk, in favor of the prevailing party in the proceeding in which the error is alleged to have occurred, or his personal representatives, conditioned for the payment of the judgment in said original cause in case of failure to sustain the writ of error.

"The supreme court shall have power to order additional bond upon motion, and to determine the amount of the penalty thereof and the sufficiency of the sureties to the same, or to the bond given before proceeding to a hearing on the writ."

Section 1882 of the Revised Laws provides as follows:

"No reversal on error shall affect the validity of any sale of personal or real property made on execution prior to the service of the copy of the assignment of errors. The issue of a writ of error and the filing a bond as above provided shall stay execution from and after notice of the same could have reached the officer making the levy of the same. It shall be the duty of the clerk or magistrate of the court to which the writ is addressed to notify such officer, and he shall be deemed to have received such notice by the first mail after the receipt of said writ, if making a levy in a place other than the residence of such clerk or magistrate, otherwise on the same day."

Presuming for the sake of argument the service of process was improper and presuming that the defendant had notice of the pendency of the proceedings the defendant could have reviewed the alleged error in the service of process by appeal; but presuming further that he had no notice of pendency of proceedings prior to May 25, he still had ample time after knowledge within which to prosecute a writ of error to the Supreme Court. In either event execution would have been stayed. On the trial, however, he secured a withdrawal of the second execution upon a promise by his agent to pay:

> "Pursuant to the second writ certain real property of the plaintiff was advertised for sale but the execution was withdrawn upon the promise of John F. Colburn, the plaintiff's agent, that he would settle. The promise not being kept a third execution similar to the second was issued May 25, 1904 * * *." (See Record p. 141.)

Repeated promises were made only, however, to be broken. (See Record p. 143.) On June 30, having secured a postponement of the sale upon a promise to pay from June 27 preceding to July 5, the defendant made a motion in the district court to recall the third, or as it is termed, alias execution, upon the ground that the court had obtained no jurisdiction of his person by service of the summons; that the action was irregularly brought in the name of the assessor without avering that the money sued on was for the use of the Territory; that at the date of the alias execution the assessor bringing the suit had resigned and that his successor was qualified and acting, and that an improper levy had been made by the High Sheriff, which motion was on that date denied. Thereafter, and on July 1, a new magistrate being in office the defendant repeated his motion in different form praying in this that "the service of summons be quashed." Four days still elapsed before the

day of sale and instead of making the motion returnable prior to the 5th day of July, the day fixed for the sale, it was made returnable on the 6th of July, and at the same time the defendant secured ex parte the so-called stay or restraining order. All the points of the so-called motion to quash service had been submitted and decided against the defendant and the motion of July 1 was nothing more than another such step in the campaign of obstruction offered by the defendant. By his own laches he had cast aside his right to review and thereby a stay of execution and was resorting to methods merely calculated to obstruct and delay. Under such circumstances, we submit, the High Sheriff being not under the legal duty to recognize the stay, he was justified in refusing to recognize it even as a matter of courtesy. Were such tactics to be permitted execution sales would never be completed.

The other act complained of is the fact that the High Sheriff insisted upon the cash deposit of fifty per cent. upon the fall of the hammer. The lower court held as a fact that "the broken promises to pay the judgment justified the High Sheriff in refusing to take the plaintiff's bids unaccompanied by a cash deposit.

The effect of the selling of the property in disobedience of the order was not necessarily to deter persons from bidding and the facts do not show that the inadequacy of price was a necessary and probable result of such disobedience. From the face of the record the prices bid were apparently simply the result of want of desire on the part of those present to acquire the premises. Prospective bidders may have been affected by the attitude of defendant's counsel at the sale but that is not something for which the purchaser should suffer. If the inadequacy of price was brought about by the acts of the defendant's agent it is something of which the defendant cannot complain. And

the cause in order to defeat the sale must be attributable or traceable to the purchaser.

17 Cyc., 1278;

Carden vs. Lane, 48 Ark. 216, 2 S. W. 709, 3 Am. St. Rep. 228;

Hudgins vs. Morrow, 47 Ark. 515, 2 S. W. 104;

Adams vs. Thomas, 44 Ark. 267;

Bach vs. May, 163 Ill. 547, 45 N. E. 248;

Thomas vs. Helmstreit, 68 Ill. 115;

Fletcher vs. McGill, 110 Ind. 395, 10 N. E. 651, 11 N. E. 779;

Lehner vs. Loomis, 83 Iowa 416, 49 N. W. 1018;

Cavender vs. Smith, 1 Iowa 306;

Iona Sav. Bank vs. Blair, 56 Kan. 430, 43 Pac. 686;

Jones vs. Carr, 41 Kan. 329, 21 Pac. 258;

Aldrich vs. Maitland, 4 Mich. 205;

Drake vs. Collins, 5 How. 253;

Durfee vs. Moran, 57 Mo. 374;

Knoop vs. Kelsey, 121 Mo. 642, 26 S. W. 683;

Tripp vs. Silkman, 29 Leg. Int. 29;

Westmoreland Guarantee Bldg., etc., Assoc. vs. Nesbit, 21 Pa. Super. Ct. 150;

Irvin vs. Ferguson, 83 Tex. 491, 18 S. W. 820;

McLaury vs. Miller, 64 Tex. 381;

Graffam vs. Burgess, 117 U. S. 108, 6 S. Ct. 686, 29 L. Ed. 839;

THE DEFENDANT HAD A PLAIN, ADEQUATE AND COMPLETE REMEDY AT LAW.

This point refers both to the judgment and the propriety of the execution sales. The court of equity will not take jurisdiction when there is a full adequate and complete remedy at law. We have already, we think, successfully shown that an appeal for the purpose of reviewing the judgment was available to the defendant.

Further in respect to the execution sale itself, the proper method of raising the question of propriety of sale is by motion in the court issuing the execution.

Gardner vs. Mobile, etc., Ry. Co., 102 Ala. 635, 15 So. 271, 48 Am. St. Rep. 635;
White vs. Farley, 81 Ala. 563, 8 So. 215;
Holly vs. Bass, 68 Ala. 296;
Lee vs. Davis, 16 Ala. 516;
Anthony vs. Shannon, 8 Ark. 52;
Boles vs. Johnston, 23 Cal. 226, 83 Am. Dec. 111;
Herr vs. Broadwell, 5 Colo. App. 467, 39 Pac. 70;
Starr vs. U. S., 8 App. Cas. 552;
Wooddy vs. Jameson, 5 Ida. 466, 50 Pac. 1008;
Prather vs. Hill, 36 Ill. 402;
Swiggart vs. Harber, 5 Ill. 364, 39 Am. Dec. 418;
Meacham vs. Sunderland, 10 Ill. App. 123;
Davis vs. Campbell, 12 Ind. 192;
Capital Bank vs. Hunloon, 35 Kan. 577, 11 Pac. 369;
Baker vs. Hall, 29 Kan. 617;
Bach vs. Whittaker, 109 Ky. 612;
Cassiday vs. McDaniel, 8 B. Mon. 519;
Hope vs. Hollis, 5 Ky. L. Rep. 319;
Carenaugh vs. Jakeway, Walk. 344;
American Wine Co. vs. Scholer, 85 Mo. 496;
Groner vs. Smith, 49 Mo. 318;

Nelson vs. Brown, 23 Mo. 13;
Miller vs. Cherry, 2 Nev. 165;
Hastings vs. Burning Moscow Gold, etc., Min. Co., 2 Nev. 100;
Vanduyne vs. Vanduyne, 16 N. J. Eq. 93;
Gould vs. Mortimer, 16 Abd. Pr. 448; 26 How. Pr. 167;
Morgan vs. Holliday, 48 How. Pr. 86;
Perkins vs. Bullinger, 2 N. C. 367;
Warren vs. Stinson, 6 N. D. 293, 70 N. W. 279;
McCarthy vs. Speed, 16 S. D. 584, 94 N. W. 411;
Cravens vs. Wilson, 48 Tex. 324;
Wilson vs. Aultman, (Civ. App. 1897), 39 S. W. 1103.

The defendant availed himself of this motion on the 6th of July but failed to prosecute his appeal from the order of the district magistrate denying the motion.

We respectfully submit that the judgment of the Supreme Court of the Territory should be reversed.

Henry Van Sicklen
Appellant in Person.

VAN GIESON *v.* MAILE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 121. Submitted April 6, 1909.—Decided April 19, 1909.

However vexatious the conduct of a litigant may be his property should not be sacrificed by reason of the court's action; and it appearing, in this case, that the existence of an order in regard to a sale of property under execution made the sale disastrous, it was proper, whether the order was valid or not, to set the sale aside and order a reconveyance on payment into court of the amount of the judgment.

THE facts are stated in the opinion.

Mr Henry Van Gieson, appellant *pro se*.

There was no brief for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a bill in equity brought by the appellee to set aside a sale on execution to Van Gieson. The bill alleges the bringing of an action for taxes by a collector, recovery of a judgment on default, and the issue of execution thereupon. It sets up various supposed technical defects in the summons and subsequent proceedings, but these do not need to be stated. It is enough to say that on the ground of such supposed defects motions were made, in the District Court where the judgment was rendered, that the execution be recalled, that the service of summons be set aside and quashed, and that the High Sheriff be ordered not to sell under the execution until further order of the court. This order was made and a time was fixed for the

hearing of the motion at an early day. Nevertheless the sheriff proceeded with the sale as it had been advertised, on the day before that fixed for the hearing, and sold three lots of land, at a very inadequate price, to Van Gieson, an assistant of his. He gave notice pending the sale that at the fall of the hammer he should require a deposit of fifty per cent of the purchase money for each parcel then unsold, a condition not contained in the notice of sale and not enforced against Van Gieson. The bill is founded on the alleged defects in the proceedings before execution as well as in the sale and prays to have the judgment declared void, and, as we have said, the sale set aside. The Supreme Court of the Territory set aside the sale and upon the plaintiff paying into court the amount of the judgment ordered a reconveyance, whereupon Van Gieson appealed to this court.

The ground on which the Supreme Court went was the single short point that the existence of the order, whether valid or not, was what made the sale disastrous. We see no reason for not accepting this conclusion. However vexatious the conduct of the appellee may have been, his property should not be sacrificed by reason of the act of a court.

Decree affirmed.